

2016

Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway

John R. Mills

The Phillips Black Project

Anna M. Dorn

The Phillips Black Project

Amelia Courtney Hritz

The Phillips Black Project

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/aulr>



Part of the [Juvenile Law Commons](#)

Recommended Citation

Mills, John R.; Dorn, Anna M.; and Hritz, Amelia Courtney (2016) "Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway," *American University Law Review*. Vol. 65 : Iss. 3 , Article 4.

Available at: <https://digitalcommons.wcl.american.edu/aulr/vol65/iss3/4>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway

ARTICLE

JUVENILE LIFE WITHOUT PAROLE IN LAW AND PRACTICE: CHRONICLING THE RAPID CHANGE UNDERWAY

JOHN R. MILLS,* ANNA M. DORN,** AND AMELIA COURTNEY HRITZ***

This Article provides a comprehensive examination of juvenile life without parole (“JLWOP”) both as a policy and in practice. Beginning in 2010, the U.S. Supreme Court has repeatedly held that the Eighth Amendment of the U.S. Constitution restricts the reach of JLWOP sentences, first prohibiting it for non-homicide offenses, then proscribing its mandatory application for any offense, and, in 2016, clarifying that it may only be imposed in the rare instance in which a juvenile’s homicide demonstrates his or her “irreparable corruption.” The legislative responses to these cases have been to either abandon or restrict JLWOP’s application. These legislative changes undo aspects of the rapid expansion of harsh juvenile sentencing policies enacted across the country starting in the early-1990s and represent a trend away from using JLWOP sentences.

By analyzing JLWOP sentencing data from state departments of corrections, this Article includes three significant findings. First, among juveniles arrested for homicide, African American youth receive JLWOP sentences twice as often

* Principal Attorney, Phillips Black Project. The Phillips Black Project is a public interest law practice committed to providing the highest quality legal representation to those facing the severest penalties authorized by law. Lecturer, University of California, Berkeley School of Law.

** Research Fellow, Phillips Black Project. Ms. Dorn focuses exclusively on juvenile life without parole (“JLWOP”) sentencing policy and practices.

*** Graduate student, dual PhD/JD Developmental Psychology and Law Program, Cornell University. The authors would like to thank Sheri Lynn Johnson, John Blume, and Jennifer Breen for their thoughtful comments on early drafts and Karlyn Lacey and Sarah Edwards for their invaluable research assistance.

as their white counterparts. Second, a small number of counties are responsible for all JLWOP sentences nationally and in large disproportion to their population. Third, JLWOP sentencing dramatically increased during the same time period that states were enacting harsh juvenile sentencing laws—laws that are now falling out of favor. The Article offers potential reasons for these observations, but further study is required to fully explain the disparities in JLWOP sentencing practices. Such study is warranted because each observation raises substantial questions about the wisdom and constitutionality of JLWOP sentences, given the U.S. Supreme Court's increased interest in restricting its application.

TABLE OF CONTENTS

Introduction.....	537
I. The Eighth Amendment and Juvenile Justice	538
A. Evolving Standards of Decency.....	538
B. National Consensus Findings in the Court's Decade of Juvenile Cases	541
C. Independent Judgment About the Proportionality of Sentencing Juveniles to Life Without Parole	547
II. State Abandonment of JLWOP in Law and Practice	549
A. Methodology and Limitations.....	549
B. Changes in JLWOP Policies	552
C. JLWOP Actual Sentencing Practices Demonstrate It Is an Outdated, Disfavored Practice, Disproportionately Imposed on Children of Color	560
1. Most JLWOP sentences were imposed in the mid-1990s..	560
2. Recent policy changes limit the ongoing impact of JLWOP, including in the jurisdictions that retain it and have used the sentence the most	568
3. JLWOP sentences are concentrated in a handful of outlier jurisdictions.....	571
4. African American juveniles are disproportionately sentenced to JLWOP.....	575
III. The Myth of the Superpredator and the Rise of JLWOP Sentences	581
A. Creation of the Myth.....	582
B. Resulting Policies.....	584
C. Only a Myth	585
Conclusion	586

INTRODUCTION

This Article examines the rapid changes underway in sentencing juveniles to life without parole (“JLWOP”). It examines both the rapid changes in the law and in the actual sentencing practices in the counties and states that continue to sentence juveniles to die in prison for crimes they commit before reaching eighteen years of age.¹ In *Miller v. Alabama*,² the U.S. Supreme Court held that mandatory life without parole sentences for juveniles violate the Eighth Amendment.³ In *Montgomery v. Louisiana*,⁴ the Court said that such a sentence is “disproportionate . . . for all but the rarest of children, those whose crimes reflect ‘irreparable corruption.’”⁵ The Court has explicitly held open the question of whether any such sentence is constitutional.⁶ This Article addresses when, where, and on whom JLWOP sentences are being imposed—questions relevant to its constitutionality.

1. This Article is timely and unique in several respects. First, no prior report has examined county-by-county sentencing. Second, earlier reports on JLWOP predate the U.S. Supreme Court’s recent jurisprudence and the resulting change to juvenile justice. See, e.g., AMNESTY INT’L & HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 1 (2005), <http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf> (providing an example of a study addressing JLWOP prior to the Court’s recent decisions). As this Article will show, the changes to JLWOP in the last decade will have profound effects on the JLWOP population. Third, prior studies focused on total population, combining the impact of JLWOP sentencing with JLWOP arrests, which obscured the role of the prosecutor and sentence. *Id.* at 39. In contrast, this Article examines race and JLWOP as it relates to arrest rate.

2. 132 S. Ct. 2455 (2012).

3. *Id.* at 2475.

4. 136 S. Ct. 718 (2016).

5. *Id.* at 726 (quoting *Miller*, 132 S. Ct. at 2469) (holding that *Miller* applies retroactively to cases on collateral review).

6. See *Miller*, 132 S. Ct. at 2469 (noting that the Court did “not consider . . . [whether] the Eighth Amendment requires a categorical bar on life without parole for juveniles”). In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court requested briefs arguing whether *Miller* applies retroactively. One of the briefs filed in response requested that the Court hear arguments on the constitutionality of JLWOP. Brief of the Charles Hamilton Houston Institute for Race & Justice & the Criminal Justice Institute as Amici Curiae in Support of Neither Party at 2, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280). Additionally, *State v. Houston*, 353 P.3d 55 (Utah 2015), *petition for cert. filed*, No. 15-7087 (U.S. Nov. 20, 2015) also presents this issue and is pending before the Court. Most recently, the Court granted certiorari in *State v. Jacobs*, 165 So. 3d 69 (La. 2015) (per curiam), *vacated sub nom. Lawrence v. Louisiana*, 2016 WL 854176 (U.S. Mar. 7, 2016), ultimately vacating the lower court’s judgment and remanding the case in light of its holding in *Montgomery*.

Examining a comprehensive data set of all persons currently serving JLWOP sentences,⁷ this Article finds that the vast majority of JLWOP sentences are the product of sentencing policies adopted during the height of interest in the myth of the superpredator,⁸ are isolated in a handful of counties and states,⁹ and the states with those policies are rapidly abandoning them.¹⁰ The Article also demonstrates that there are twice as many African American offenders currently serving JLWOP sentences as their similarly situated white counterparts.¹¹

This Article proceeds in three parts. Part One explains the Court's examination of legislation and sentencing trends as part of its national consensus analysis, which is relevant to determining whether sentencing juveniles to JLWOP violates the Eighth Amendment. Part Two examines the use of JLWOP in law and in practice. It demonstrates that the dawn of JLWOP sentences are a relatively recent phenomenon; that more recently, jurisdictions are abandoning the sentence; and those that impose it do so disproportionately on persons of color. Part Three discusses a potential explanation for these trends, including a discussion of the "Superpredator Era," a period marked by fear of a generation of violent youth, a group that never materialized.

The implementation—and rapid abandonment—of JLWOP raises questions about its penological justifiability and constitutionality.

I. THE EIGHTH AMENDMENT AND JUVENILE JUSTICE

A. *Evolving Standards of Decency*

The Eighth Amendment's prohibition on cruel and unusual punishment¹² is measured against the "evolving standards of decency that mark the progress of a maturing society."¹³ Because "its

7. See *infra* Appendix B.

8. See *infra* Section III.A (noting the timing of the sentences and the theory of superpredators); *infra* Section III.B (detailing the policies developed during the Superpredator Era).

9. See *infra* Part II (providing statistics of states and counties imposing the majority of JLWOP sentences).

10. See *infra* Section II.C.2 (noting recent abandonment and restriction of JLWOP sentencing policies and their potential breadth).

11. See *infra* Section II.C (comparing the statistics of African American and white juvenile offenders receiving JLWOP).

12. U.S. CONST. amend. VIII.

13. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

applicability must change as the basic mores of society change,”¹⁴ the U.S. Supreme Court looks to contemporary societal norms.¹⁵ Since 2002, the Court has measured “evolving standards of decency” by determining whether a national consensus supports categorically prohibiting a given punishment.¹⁶ If there is a national consensus against a punishment, the Court will exercise its independent judgment to determine whether the punishment is proportionate to the offender and the offense.¹⁷

To assess whether there is a national consensus about a particular punishment, legislative enactments constitute the “clearest and most reliable objective evidence of contemporary values,”¹⁸ but “[a]ctual sentencing practices are [also] an important part of the Court’s inquiry into consensus.”¹⁹ The number of states authorizing a given punishment, the extent and direction of legislative change addressing the punishment, and the frequency with which the punishment is actually imposed²⁰ are all relevant to this analysis.²¹ Thus, even where

14. *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)), *modified*, 554 U.S. 945 (2008).

15. See Robert J. Smith et al., *The Way the Court Gauges Consensus (and How to Do It Better)*, 35 CARDOZO L. REV. 2397, 2406 n.43 (2014) (observing that in trying to determine the consensus of society, the Court has considered opinions of social and professional organizations, the findings of public opinion polls, and the views held by the international community).

16. *Atkins v. Virginia*, 536 U.S. 304, 311–12, 316 (2002) (noting the Court’s attempt to evaluate “evolving standards of decency” when determining whether a given punishment is acceptable under the Eighth Amendment (quoting *Trop*, 356 U.S. at 101)); see Jennifer S. Breen & John R. Mills, *Mandating Discretion: Juvenile Sentencing Schemes After Miller v. Alabama*, 52 AM. CRIM. L. REV. 293, 301–02 (2015) (describing the factors evaluated by the Court in determining “national consensus,” including public opinion, trends in state legislatures, and international practice).

17. *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (holding that “national consensus” supported a holding that death penalty sentences for crimes committed as a juvenile are unconstitutional); see also *Harmelin v. Michigan*, 501 U.S. 957, 997–98 (1991) (Kennedy, J., concurring) (describing the evolution of the Court’s jurisprudence on sentencing proportionality).

18. *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

19. *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting JLWOP sentences for non-homicide offenses committed by persons under age eighteen at the time of the offense).

20. In the context of the death penalty, the “imposition” question is assessed under at least two criteria: the number of sentences meted out and the number of sentences enforced, that is, the number of persons actually executed. See *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008) (“Statistics about . . . executions may inform the consideration whether capital punishment . . . is regarded as unacceptable in our society.”), *modified*, 554 U.S. 945 (2008).

21. See *Miller v. Alabama*, 132 S. Ct. 2455, 2470–71 (2012) (observing that the mere fact that a majority of states allowed imposition of JLWOP sentences on

a practice was once common, a more recent repudiation of that practice indicates a national consensus against it and suggests that it violates the Eighth Amendment.

In addition to determining the existence or absence of a national consensus against a sentencing practice, the Court analyzes whether the practice is proportionate.²² To make this assessment, the Court is “guided by ‘the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.’”²³ This analysis examines the penological justifications for the punishment: incapacitation, retribution, deterrence, and rehabilitation.²⁴ “A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense” and highly relevant to the Eighth Amendment inquiry.²⁵ For example, the Court in *Atkins v. Virginia*²⁶ held that the imposition of a death sentence on an intellectually disabled person was unconstitutional because, inter alia, it failed to serve retributive and deterrent functions due to the impairments inherent to intellectual disability.²⁷

Since *Atkins*, the Court has employed its consensus analysis five times to strike down extreme sentencing practices.²⁸ These five cases

individuals under eighteen was not enough on its own to preclude the Court from finding such punishments unconstitutional); *Kennedy*, 554 U.S. at 433 (noting statistics about the imposition of a sentence as relevant); *Atkins*, 536 U.S. at 312 (highlighting a preference for objective factors, such as legislation enacted, in determining sentencing standards). Other factors, such as opinion polls and the international community’s condemnation of a practice, have been cited by the Court, but most scholars agree that these other factors have, at most, limited influence on the Court’s conclusions. See Smith et al., *supra* note 15, at 2406 n.43 (describing such factors as “more atmospheric than substantive”).

22. See *Graham*, 560 U.S. at 59 (“The concept of proportionality is central to the Eighth Amendment.”).

23. *Id.* at 61 (quoting *Kennedy*, 554 U.S. at 421).

24. See *id.* at 61, 67; see also *infra* note 86 (discussing the Court’s use of its certiorari authority to assure alignment of its independent judgment with the national consensus).

25. *Graham*, 560 U.S. at 71.

26. 536 U.S. 304 (2002).

27. *Id.* at 319–20; accord *Gregg v. Georgia*, 428 U.S. 153, 183, 183 n.28 (1976) (asserting that retribution and deterrence are the “two principal social purposes” of the death penalty, and noting that such a sentence necessarily accomplishes incapacitation and forgoes all hope of rehabilitation). Similar to the death penalty, for sentences of life without the possibility of parole, retribution and deterrence are the only relevant factors justifying the sentence.

28. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (invalidating a strict IQ cutoff score of seventy to measure intellectual disability relevant to eligibility for the death

address death sentences for persons less than eighteen years old at the time of their offense,²⁹ death sentences for non-homicide offenses,³⁰ JLWOP sentences for non-homicide offenses,³¹ mandatory JLWOP,³² and a strict IQ score cut-off of seventy for proving *Atkins* claims.³³

Three of these five opinions address punishments for juveniles, suggesting a willingness to invalidate harsh punishments that treat juvenile offenders as harshly as their adult counterparts, despite a national consensus against doing so.³⁴ To find such a consensus and ban the punishment in these cases, the Court examined legislative enactments, actual sentencing practices, and the proportionality of the punishment to the offender and the offense.³⁵ The next subsections examine, respectively, how the Court found a national consensus in each of the juvenile sentencing cases and its independent judgment regarding the proportionality of sentencing a juvenile to serving a life sentence without the possibility of parole.

B. National Consensus Findings in the Court's Decade of Juvenile Cases

In the last decade, the Court has shown an increased willingness to involve itself in the regulation of juvenile justice, issuing four landmark juvenile justice opinions between 2005 and 2016. Three of those cases, *Roper v. Simmons*,³⁶ *Graham v. Florida*,³⁷ and *Miller v. Alabama*,³⁸ struck down punishments that violated the Eighth Amendment.³⁹ In holding each of the three sentences

penalty); *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (rejecting mandatory imposition of JLWOP on persons under age eighteen at the time of the offense); *Graham*, 560 U.S. at 82 (denouncing JLWOP sentences for non-homicide offenses committed by persons under age eighteen at the time of the offense); *Kennedy*, 554 U.S. at 447 (prohibiting imposition of the death penalty for non-homicide offenses); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (denying imposition of the death penalty on those under age eighteen at the time of the offense).

29. *Roper*, 543 U.S. at 578–79.

30. *Kennedy*, 554 U.S. at 447.

31. *Graham*, 560 U.S. at 82.

32. *Miller*, 132 S. Ct. at 2475.

33. *Hall*, 134 S. Ct. at 2001.

34. *Miller*, 132 S. Ct. at 2475; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578–79.

35. *Miller*, 132 S. Ct. at 2463, 2469–72, 2471 n.10; *Graham*, 560 U.S. at 62–71; *Roper*, 543 U.S. at 564–68, 575.

36. 543 U.S. 551 (2005).

37. 560 U.S. 48 (2010).

38. 132 S. Ct. 2455 (2012).

39. *Miller*, 132 S. Ct. at 2475 (holding that mandatory JLWOP sentences for homicide crimes violates the Eighth Amendment); *Graham*, 560 U.S. at 82 (prohibiting JLWOP sentence for crimes other than homicide); *Roper*, 543 U.S. at

unconstitutional, the Court found a national consensus against the punishment as a critical part of its analysis.⁴⁰ This subsection examines the Court's national consensus analysis in those cases.

In the first case, *Roper v. Simmons*, the Court found that there was a national consensus against the imposition of the death penalty on offenders under eighteen-years-old at the time of their crime.⁴¹ Fifteen years before this decision, the Court held in *Stanford v. Kentucky*⁴² that executing a person for an offense committed as a sixteen- or seventeen-year-old did not violate the Eighth Amendment.⁴³ In *Roper*, the Court first counted the states that banned the practice.⁴⁴ Thirty states prohibited the execution of offenders under the age of eighteen: twelve banned the death penalty altogether, and eighteen exempted juvenile offenders from its reach.⁴⁵

The Court also noted that "the direction of change," namely that states banned—rather than reinstated—the death penalty for juveniles after the Court's affirmance of the death penalty for sixteen- and seventeen-year-olds.⁴⁶ Since the Court's decision in *Stanford*, five states abandoned the death penalty for those under eighteen, "four through legislative enactments and one through judicial decision."⁴⁷

578–79 (holding that a death penalty sentence is unconstitutional for juveniles). Prior to *Roper v. Simmons*, the last time the Court substantively addressed juvenile justice issues was in two cases decided on June 26, 1989. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (ruling that executing someone for a crime committed when the person was sixteen- or seventeen-years-old did not violate the Eighth Amendment), *abrogated by Roper*, 543 U.S. 551. A fourth case, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), addressed whether a juvenile's age was relevant to determining if the juvenile was in custody, triggering the necessity of *Miranda* warnings. *Id.* at 2398, 2408. As noted above, the Court recently held that *Miller's* bar on mandatory JLWOP sentences applies retroactively. See *supra* note 5. Whether the opinion did more, as Justice Scalia's dissent suggested, is beyond the scope of this Article. *Montgomery v. Louisiana*, 136 S. Ct. 718, 744 (2016) (Scalia, J., dissenting) (accusing the majority of interpreting *Miller* in a "devious way" to effectively eliminate JLWOP).

40. See *Miller*, 132 S. Ct. at 2470–71; *Graham*, 560 U.S. at 62, 67; *Roper*, 543 U.S. at 564–68.

41. *Roper*, 543 U.S. at 567.

42. 492 U.S. 361 (1989).

43. See *id.* at 380 (determining that a lack of "societal consensus" existed, and therefore, imposing the death penalty on sixteen and seventeen year olds convicted of murder to be constitutional).

44. *Roper*, 543 U.S. at 564.

45. *Id.* (observing that the same number of states prohibited executing the intellectually disabled when the Court, in *Atkins*, found a national consensus against that practice (citing *Atkins v. Virginia*, 536 U.S. 304, 313–15 (2002))).

46. *Id.* at 565–66 (quoting *Atkins*, 536 U.S. at 315).

47. *Id.* at 565.

No state that previously barred capital punishment for juvenile offenses had since reinstated it.⁴⁸

Finally, the Court noted that the total numbers of actual executions for offenses committed by juveniles was “infrequent.”⁴⁹ In the ten years preceding the Court’s decision, only three states had carried out such an execution.⁵⁰ Thus, the Court examined the actual practice of carrying out the punishment in addition to formal prohibition of the practice.⁵¹ For these reasons, the Court concluded that

the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles . . . as “categorically less culpable than the average criminal.”⁵²

In the second juvenile sentencing case, *Graham v. Florida*, the Court found a national consensus against sentences of life without parole for non-homicide offenses committed by persons less than eighteen-years-old at the time of the offense.⁵³ The Court found a national consensus against the punishment based on its infrequent use, “despite its widespread legislative authorization.”⁵⁴

At the time of the opinion, only seven jurisdictions legislatively prohibited JLWOP for non-homicide crimes, and just six jurisdictions had outlawed JLWOP entirely.⁵⁵ The Court found, however, that the sentence was “exceedingly rare” in practice,⁵⁶ identifying 123 persons

48. *Id.* at 566.

49. *Id.* at 553.

50. *Id.* at 565 (Oklahoma, Texas, and Virginia).

51. *Id.* at 564–65 (noting that after the Court’s decision in *Stanford v. Kentucky*, Kentucky’s governor elected to spare Mr. Stanford from execution, stating, “[w]e ought not be executing people who, legally, were children” (alteration in original)).

Doubtlessly, the Kentucky’s governor’s act of executive mercy had emotional resonance for the members of the Court who had previously voted to permit Mr. Stanford’s execution, but it is properly understood as peripheral to the Court’s analysis. See generally Smith et al., *supra* note 15, at 2406 n.43 (characterizing factors of this sort as “atmospheric” as opposed to “substantive” factors which may play a more important role in a particular case).

52. *Roper*, 543 U.S. at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

53. *Graham v. Florida*, 560 U.S. 48, 55, 57, 67, 82 (2010) (finding that Graham’s JLWOP sentence was unconstitutional because he committed a non-homicide offense while seventeen years old).

54. Smith et al., *supra* note 15, at 2451.

55. *Graham*, 560 U.S. at 62.

56. *Id.* at 62, 67.

serving JLWOP for a non-homicide offense.⁵⁷ The Court found that even this number was over-representative of the commonality of the practice: "It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades."⁵⁸ The Court necessarily assumed that some of the 123 sentences were imposed based on outdated sentencing policies and practices.⁵⁹ Thus, the Court found that the total number of sentences, as well as *when* those sentences were entered, was relevant to whether there was a national consensus.

The Court also considered whether the sentences actually imposed were geographically isolated and identified thirty-seven states and the District of Columbia that authorized JLWOP for non-homicide offenses.⁶⁰ Only eleven states had ever imposed the sentence, and a single state, Florida, accounted for the majority of JLWOP sentences.⁶¹ Thus, the Court found a national consensus against JLWOP for non-homicide offenses based on *when* and *where* the offenses were imposed and despite de jure authorization of the offenses in most states.

In the third juvenile sentencing case, *Miller v. Alabama*, the Court held that the Eighth Amendment required individualized consideration of the mitigating aspects of youth before exercising discretion to impose JLWOP.⁶² The Court rejected the state's argument that because twenty-nine jurisdictions statutorily authorized the punishment, there could be no consensus against it.⁶³ The Court noted that when it decided *Graham*, there were thirty-nine jurisdictions authorizing JLWOP for non-homicide offenses, and the

57. *Id.* at 62–64 (citing PAOLO G. ANNINO ET AL., JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 2 (2009)) (clarifying that the 123 persons does not include juveniles who received JLWOP sentences for non-homicide offenses at the same time they received a JLWOP sentence for a homicide offense because "[i]t is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination").

58. *Id.* at 65.

59. *Id.*

60. *Id.* at 62.

61. *Id.* at 64 (finding that 77 of the 123 individuals serving a JLWOP sentence for non-homicide offenses were imposed by Florida (citing ANNINO ET AL., *supra* note 57, at 2)).

62. *Miller v. Alabama*, 132 S. Ct. 2455, 2460, 2475 (2012) (remanding two separate cases of fourteen-year-old defendants who were convicted of murder and sentenced to JLWOP).

63. *Id.* at 2471.

Court nonetheless found a consensus against that punishment.⁶⁴ It also noted that “in *Atkins*, *Roper*, and *Thompson*, we similarly banned the death penalty in circumstances in which ‘less than half’ of the ‘States that permit[ted] capital punishment (for whom the issue exist[ed])’ had previously chosen to do so.”⁶⁵

The Court explained that “the statutory eligibility of a [JLWOP sentence] does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration” because “more than half” of the twenty-nine jurisdictions with mandatory JLWOP impose it “by virtue of generally applicable penalty provisions” that apply, without discussion, to children and adults alike.⁶⁶ The Court thus concluded that there being twenty-nine jurisdictions authorizing mandatory JLWOP was no bar to an Eighth Amendment prohibition.⁶⁷

The Court held that two lines of its precedent required individualized consideration of juveniles before imposing JLWOP. Its recent precedents on juvenile punishment established that “children are different” when it comes to sentencing.⁶⁸ Its death penalty jurisprudence established the necessity of particularized consideration of the offender before imposing the most severe sentences authorized under law.⁶⁹ Together, these two strands of precedent required individualized consideration of the juvenile before imposing a sentence that would necessarily mean the juvenile would die in prison.⁷⁰ The Court expressly reserved the question of whether JLWOP itself violated the Eighth Amendment.⁷¹

64. *Id.* at 2471–73 (finding a lack of consensus in practice even though thirty-seven states, the District of Columbia, and the Federal government all allowed JLWOP sentences for juveniles who committed non-homicide offenses).

65. *Id.* at 2472 (quoting *Atkins v. Virginia*, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting) (alteration in original)).

66. *Id.* at 2473 (quoting *Graham*, 560 U.S. at 67).

67. *Id.*

68. *Id.* at 2469.

69. *Id.* at 2467 (citing *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion) (requiring consideration of a defendant’s character and record prior to imposing death sentence)).

70. *Id.* at 2467, 2469.

71. *Id.* at 2469 (“Because [the Court’s] holding is sufficient to decide these cases [at bar], we do not consider Jackson’s and Miller’s alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those [fourteen] and younger. But given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”).

In the Court's two most recent Eighth Amendment cases on the prohibition of capital punishment on the intellectually disabled, *Atkins v. Virginia* and *Hall v. Florida*,⁷² its national consensus analysis proceeded similarly to its jurisprudence in these three juvenile cases.

In *Atkins*, the Court counted nineteen states—thirty-three when including states that forbid the death penalty altogether—that had prohibited the death penalty for the intellectually disabled.⁷³ As with *Graham*, however, the *Atkins* opinion “forcefully demonstrate[s that] legislative enactments are not dispositive.”⁷⁴ For example, the Court noted that the fact that states like New Hampshire and New Jersey still statutorily authorized executions of the intellectually disabled carried little weight, because no such executions had been carried out in decades.⁷⁵ Put differently, “a state’s failure to execute . . . individuals for long periods of time could arguably be construed as evidence that a state is as good as abolitionist for national consensus purposes.”⁷⁶

The *Atkins* Court was also the first case to address the notion of “direction,” explaining that it is “not so much the number of these States that is significant, but the consistency of the direction of change.”⁷⁷ Specifically, the Court noted that seventeen states had abolished the death penalty for the intellectually disabled since the Court had denied the Eighth Amendment claim in *Penry v. Lynaugh*⁷⁸ and that there was a “complete absence of States passing legislation reinstating” the penalty for the intellectually disabled.⁷⁹

In *Hall v. Florida*, the Court held that a strict cut-off score of seventy and above failed to take account of the standard measure of error in intelligence quotient tests and was thus contrary to the national consensus.⁸⁰ In so finding, the *Hall* Court applied and expanded upon its national consensus analysis by looking not only to legislation or practice, but also to professional norms: “The legal determination

72. 134 S. Ct. 1986 (2014).

73. See *Atkins v. Virginia*, 536 U.S. 304, 313–15 (2002) (including jurisdictions that had fully abolished the death penalty).

74. Smith et al., *supra* note 15, at 2408; see *Atkins*, 536 U.S. at 316 (noting that some states that have not enacted legislation to prohibit the imposition of the death penalty on individuals that are intellectually disabled still support a national consensus against executing the intellectually disabled because the sentence has not recently been imposed on persons with such a disability in the state).

75. *Atkins*, 536 U.S. at 316.

76. Smith et al., *supra* note 15, at 2408.

77. *Atkins*, 536 U.S. at 315.

78. 492 U.S. 302 (1989).

79. *Atkins*, 536 U.S. at 315–16.

80. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

of intellectual disability . . . is informed by the medical community's diagnostic framework."⁸¹ Because Florida's statute went "against the unanimous professional consensus," the Court concluded, it was invalid under the Eighth Amendment.⁸²

A critical aspect of the Court's Eighth Amendment jurisprudence in juvenile sentencing is whether there is a national consensus against a punishment.⁸³ The Court examines formal authorization, including the nature and direction of change regarding authorization, actual sentencing practices, and whether the sentences are geographically isolated.⁸⁴ Where the sentences are geographically isolated and from a bygone era, the Court may invalidate a sentence, even where most states formally authorize it.⁸⁵

C. Independent Judgment About the Proportionality of Sentencing Juveniles to Life Without Parole

Where the Court finds a national consensus against a punishment, it may invalidate that punishment where, in the Court's independent judgment, the punishment lacks the penological justifications of incapacitation, retribution, deterrence, or rehabilitation.⁸⁶ Relying

81. *Id.* at 2000.

82. *Id.* at 1994, 2000 (quoting Brief of Amici Curiae American Psychological Association, American Psychiatric Association, American Academy of Psychiatry & the Law, Florida Psychological Association, National Association of Social Workers, & National Association of Social Workers Florida Chapter in Support of Petitioner at 15, *Hall v. Florida*, 134 S. Ct. 1986 (2014) (No. 12-10882)).

83. See *supra* notes 12–21 and accompanying text (discussing the Court's reliance on establishing a national consensus in determining constitutionality).

84. See *supra* notes 18–21 and accompanying text (explaining relevant factors the Court uses to determine whether there is national consensus).

85. See *supra* notes 75–79 and accompanying text (referencing the Court's decision in *Atkins* which showed a willingness to evaluate imposed sentences and the general trends of the states).

86. See *Graham v. Florida*, 560 U.S. 48, 71 (2010) ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."). Several commentators have noted that the Court has never found a national consensus against a punishment where it did not also hold that its independent judgment required prohibition of the punishments and vice versa. See Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 590 (2010) (observing a resurgence of the Court's reliance on its own judgment in deciding whether a punishment is suitable); see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1730–31 (2000) (adding that the Court can change its interpretation of the Constitution by exercising its power to select cases or refuse cases). Perhaps the best explanation for this consistent convergence is the Court's use of discretion in granting certiorari in cases where the

on psychological and social science evidence, as well as what “any parent knows,” the Court has consistently held that these purposes are greatly diminished in the context of imposing extreme sentences on juveniles.⁸⁷ That is, children are inherently less culpable than their adult counterparts.⁸⁸ They are “more vulnerable” to “negative influences and outside pressures, including peer pressure.”⁸⁹ “Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”⁹⁰ Thus, the retributive rationale is diminished for juvenile offenders.⁹¹

The hallmark features of youth similarly weaken the deterrent rationale. “[I]mmaturity, impetuosity, and failure to appreciate risks and consequences” diminish the deterrent rationale because those features are characteristic of youth and undermine a juvenile’s ability to apply future consequences to their present conduct.⁹²

Finally, in *Roper*, the Court held that juveniles are uniquely amenable to reform. As the *Roper* Court noted, “the character of a juvenile is not as well formed as that of an adult.”⁹³ That a juvenile is still struggling to form her or his identity “means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”⁹⁴ Moreover, a sentence of life without parole is a once and for all finding that a juvenile is among the few “incorrigible juvenile offenders [and distinguishable] from the many that have the capacity for change.”⁹⁵

The Court has repeatedly held that the characteristics of youth weaken the rationales for imposing the harshest available penalties, and the scientific literature and the Court’s authorities continue to

national consensus and its independent judgment are likely to align. SUP. CT. R. 10 (providing grounds for granting a writ of certiorari).

87. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

88. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

89. *Roper*, 543 U.S. at 569.

90. *Id.* at 553.

91. No greater incapacitation for juveniles is authorized than life without parole. *See id.* at 578 (banning death penalty for juveniles). Thus, the incapacitation value is at its zenith for such sentences.

92. *Miller*, 132 S. Ct. at 2468.

93. *Roper*, 543 U.S. at 570.

94. *Id.* at 553. “Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.” *Id.* at 570.

95. *Graham v. Florida*, 560 U.S. 48, 77 (2010).

confirm these common-sense holdings.⁹⁶ For this reason, the remainder of this Article focuses on the particularities of JLWOP, first examining its authorization and implementation and then discussing potential explanations for the trends present in JLWOP sentencing.

II. STATE ABANDONMENT OF JLWOP IN LAW AND PRACTICE

Rapid change is underway in the area of JLWOP. Legislatures are restricting its availability, and its use is highly concentrated, both within states and counties. This section first examines the state-by-state changes to JLWOP as a matter of policy. Next, it explains how JLWOP sentences are being imposed in practice.

A. *Methodology and Limitations*

This Part's remaining analysis proceeds in two steps. First, it examines the state-by-state policies regarding JLWOP, with a focus on statutory law. It provides an overview of the authorization, abolition, and major changes in the law affecting implementation of JLWOP. Other than the rapid changes in the law presently under way,⁹⁷ no significant limitations affect this part of the analysis.

In the second step of its analysis, this Part examines JLWOP sentencing practices, employing data from state departments of corrections. Between May and September 2015, the authors sent out requests for information regarding the current inmates in each jurisdiction's prison system serving a sentence of JLWOP.⁹⁸ Specifically, they sought: the name, date of birth, race, gender, offense date, sentencing date, age at time of offense, and county of conviction. Overall, the departments of corrections were very responsive.

The data, where possible, were checked against other public information.⁹⁹ These sources included any available appellate

96. *Id.* at 50; *Roper*, 543 U.S. at 569.

97. *E.g.*, *State v. Lyle*, 854 N.W.2d 378, 387 (Iowa 2014) (noting that "constitutional protection for the rights of juveniles . . . is rapidly evolving").

98. The authors sought information about the individuals currently serving JLWOP sentences in order to explore the characteristics of individuals who would be affected by a change in the JLWOP sentencing practices. Thus, we do not have information about juveniles who were sentenced to JLWOP but are no longer serving those sentences. This may occur, for example, if their sentences were commuted to a term of years or they are no longer living. Therefore, we expect that our data underestimates the number of JLWOP sentences per year, especially the earlier years.

99. Louisiana's data was not checked in this manner because its Department of Corrections declined to provide the names of the persons serving JLWOP sentences. Email from Genie Powers, La. Dep't of Public Safety & Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 13, 2015, 3:11 PM) (on file with author).

decisions, department of corrections website materials, and news reports.¹⁰⁰ With a small handful of exceptions, the publicly available information confirmed the states' reports.¹⁰¹

Nonetheless, the data some states provided presented certain limitations. These limitations are detailed in Appendix A,¹⁰² but are outlined here. First, several states did not provide information about race and gender.¹⁰³ This information was not reliably available from accessible public information and has been excluded from the analysis unless provided by state departments of corrections. More problematically, however, four jurisdictions have declined to provide data at all: the federal government, Washington, D.C., New York, and Virginia. None of these jurisdictions appear to be significant users of JLWOP, and two jurisdictions, New York and Washington, D.C., do not appear to have any inmates sentenced to JLWOP.¹⁰⁴

100. See, e.g., *Lyle*, 854 N.W.2d at 380 (appealing the prosecution of a juvenile in state supreme court); *Statistics*, STATE OF CONN. DEP'T OF CORR. (2015), <http://www.ct.gov/doc/cwp/view.asp?a=1492&Q=270036> (providing statistics about the state's incarcerated population); *The Superpredator Myth, 20 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), <http://www.eji.org/node/893> (reporting on the impact of the Superpredator Era).

101. Sometimes none of this information was available. For those instances, the data was not confirmed against a second source. In the rare instances in which an alternative source of information provided conflicting information, it tended to be a difference in date of offense or sentencing and did not significantly differ from the department of corrections reports. See, e.g., *Commonwealth v. McCutchen*, 343 A.2d 669, 670 (Pa. 1975) (indicating that offender was fifteen at the time of the offense, while the Pennsylvania Department of Corrections indicated he was sixteen); *Two Charged in Slaying*, NEWS OK (Oct. 20, 1998), <http://newsok.com/article/2630214> (indicating the offender was fifteen at the time of his first court appearance, while the Oklahoma Department of Corrections indicated he was seventeen at the time of his offense). Thus, even the conflicting information did not meaningfully affect the analysis.

102. See *infra* Appendix A.

103. California, Florida, and Minnesota did not provide information about race and gender. Email from June DeVoe, Research Manager, Data Analysis Unit, Cal. Dep't of Corr. & Rehab., to Anna Dorn, Research Fellow, Phillips Black Project (July 22, 2015, 2:02 PM) (on file with author); Email from Deb Kerschner, Dir. of Planning & Performance, Minn. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Sept. 4, 2015, 6:01 AM) (on file with author). Of the 2295 individuals in our data set, we are missing race for 319 (fourteen percent).

104. See THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 2 (2015) [hereinafter THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE], http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf (providing a map of jurisdictions that have either banned or limited the use of JLWOP as of 2016, and indicating that New York and Washington, D.C. currently have no JLWOP prisoners).

In addition to withholding information, eight states—Alabama, Idaho, Indiana, Missouri, Nebraska, Nevada, Oklahoma, and Pennsylvania—have reported the number of persons entering the department of corrections and/or being sentenced to JLWOP before age eighteen instead of the persons who committed offenses before age eighteen.¹⁰⁵ These states do not record the date of offense; because of this practice, they likely underreport the total number of JLWOP sentences, particularly excluding persons sentenced to JLWOP for offenses committed at age seventeen. Thus, our analysis of age at the time of offense likely underreports the proportion of sentences for crimes committed as a seventeen-year-old. Finally, two states, Ohio and Wisconsin, provided information from 2014 and 2012, respectively, instead of current information.¹⁰⁶

Despite the limitations associated with the data from state departments of corrections, the analysis derives from a robust data set, drawing on well-vetted sources of information.¹⁰⁷

One set of analyses in this Article employs the FBI's Supplementary Homicide Reports ("SHR") to assess how race affects JLWOP sentences for juveniles arrested for homicide and how juvenile homicide rates differ from adults.¹⁰⁸ The SHR contains information on the majority of murders in the United States and is among the most reliable crime data available.¹⁰⁹

105. The following jurisdictions did not respond to the authors' request for information or provided data that was incomplete: Washington, D.C., New York, and Virginia. Email from Michele S. Howell, Legal Issues Coord., Va. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 13, 2015, 5:34 PM) (on file with author); Email from N.Y. Dep't of Corr. & Cmty. Supervision, to Anna Dorn, Research Fellow, Phillips Black Project (July 27, 2015, 3:08 PM) (on file with author); Letter from Oluwasegun Obebe, Records, Info. & Privacy Officer, D.C. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (May 21, 2015) (on file with author).

106. Email from Lauren Chalupa, Staff Counsel, Ohio Dep't of Rehab. & Corr., to Anna Dorn, Research Fellow, Phillips Black Project (June 2, 2015, 11:41 AM) (on file with author); Email from Joy Staab, Dir. of Public Affairs, Wis. Dep't of Corr. to Anna Dorn, Research Fellow, Phillips Black Project (June 3, 2015, 7:27 AM) (on file with author).

107. The Supreme Court itself sought out and relied upon reporting from state departments of corrections to determine the number of persons serving JLWOP sentences for non-homicide offenses. See *Graham v. Florida*, 560 U.S. 48, 63–64 (2010) (referencing letters from prison officials the Court used to create a more accurate estimate of the number of juveniles serving JLWOP sentences in 2010).

108. U.S. Dep't of Justice, Nat'l Ctr. for Juvenile Justice, *Easy Access to the FBI's Supplementary Homicide Reports: 1980–2013*, <http://www.ojjdp.gov/ojstatbb/ezashr> (last visited Mar. 27, 2016) [hereinafter *Supplementary Homicide Reports*].

109. See Robert J. Cottrol, *Hard Choices and Shifted Burdens: American Crime and American Justice at the End of the Century*, 65 GEO. WASH. L. REV. 506, 517 (1997) (reviewing MICHAEL TONRY, *A REVIEW OF MALIGN NEGLECT: RACE, CRIME, AND*

B. Changes in JLWOP Policies

Since *Miller*, nine states have abolished JLWOP, bringing the current number of states completely banning the sentence to fifteen.¹¹⁰ In the states that retain JLWOP policies, the legislatures and courts have diminished its impact through retroactivity rulings that provide every juvenile an opportunity to receive a lesser sentence, reforms to narrow the application of JLWOP, or a combination of the two.

States that have abolished JLWOP have generally done so in one of two ways. Most commonly, states ban the sentence outright, removing authorization for JLWOP as a sentencing possibility. Eight states have adopted this type of reform.¹¹¹ The other, less common form of abolition is achieved through a change in parole.¹¹² In the two states that have changed their parole practices, adding parole eligibility for persons under age eighteen at the time of the offense

PUNISHMENT IN AMERICA (1995)) ("Homicide is likely more reliably reported across socioeconomic, racial, and other social divisions than other crimes."); John J. Donohue, *Understanding the Time Path of Crime*, 88 J. CRIM. L. & CRIMINOLOGY 1423, 1425 (1998) (noting that reliable, long-term data for crime is generally hard to find outside of homicide); John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 14 (1998) ("[T]he crime with the best available data [is] murder."). But see Michael G. Maxfield, *Circumstances in Supplementary Homicide Reports: Variety and Validity*, 27 CRIMINOLOGY 671, 671–72, 689–91 (1989) (discussing sources of error in the Supplementary Homicide Reports ("SHR") data). The data exclude negligent manslaughter and justifiable homicides. *Supplementary Homicide Reports*, *supra* note 108.

110. *Infra* Table 1.

111. See MASS. GEN. LAWS ANN. ch. 265, § 2(b) (West 2015) (allowing parole for juveniles between the ages of fourteen and eighteen convicted of first-degree murder); S.B. 796, Gen. Assemb., Jan. Sess. (Conn. 2015) (amending CONN. GEN. STAT. § 54-125a (2014)); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (amending DEL. CODE ANN. tit. 11, §§ 4209, -A, -636(b), 4217(f), 3901 (d)); H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014) (abolishing life imprisonment without parole for offenses committed while under the age of eighteen); A.B. 267, 78th Sess. (Nev. 2015) (eliminating the imposition of a life sentence without the possibility of parole for offenses committed prior to the age of eighteen); S.B. 1083, 84th Leg., Reg. Sess. (Tex. 2015) (changing parole eligibility for a capital felony committed prior to reaching eighteen years of age); H.B. 62, 73rd Sess. (Vt. 2015) (prohibiting a sentence of life without parole for a person who was under the age of eighteen at the time of the offense); H.B. 4210, 81st Leg., 2d Sess. (W. Va. 2014) (providing that only people aged eighteen or older may be given life sentences without parole); H.B. 23, 62d Leg., Gen. Sess. (Wyo. 2013) (providing parole eligibility for lesser offenses committed prior to reaching the age of eighteen).

112. See S.B. 796, Gen. Assemb., Jan. Sess. (Conn. 2015) (allowing juveniles to go at large on parole under certain conditions); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (allowing certain modifications to parole eligibility for juvenile offenders).

eliminates JLWOP. Some states enacting the first form of abolition have explicitly made it retroactive; all states enacting the second form necessarily did so. Connecticut has undertaken both reforms.¹¹³ For this reason, a more detailed explanation of Connecticut's JLWOP sentencing statute and reforms illustrates the ways in which states have abolished JLWOP.

Before Connecticut's abolition of JLWOP, it imposed mandatory JLWOP in certain circumstances. Before April 25, 2012, if a juvenile committed a murder in which certain aggravating circumstances were present,¹¹⁴ Connecticut law authorized either JLWOP or the death penalty.¹¹⁵ Because the Eighth Amendment bars the death penalty for persons under the age of eighteen, the juvenile would be sentenced to JLWOP.¹¹⁶ For offenses committed on or after April 25, 2012, but before the new law took effect, if a juvenile committed a murder in which one of the same aggravating circumstances was present, then the sentence would be JLWOP.¹¹⁷

Connecticut's new juvenile sentencing law took effect on October 1, 2015.¹¹⁸ That law excludes juveniles from the definition of aggravated murder.¹¹⁹ Thus, it eliminates JLWOP as a sentencing possibility. The law also creates parole eligibility for those currently serving JLWOP and other lengthy sentences.¹²⁰ It provides that juveniles are eligible for parole after serving sixty percent of their sentence or twelve years, whichever is longer.¹²¹ The law also provides special criteria for the parole board to weigh when considering parole for a person incarcerated for a crime committed as a juvenile.¹²² Additionally, the law provides for appointment of

113. S.B. 796, Gen. Assemb., Jan. Sess. (Conn. 2015).

114. See CONN. GEN. STAT. § 53a-54b (2011) (enumerating aggravating circumstances).

115. See CONN. GEN. STAT. § 53a-35a(1)(A) (enumerating circumstances under which a capital felony would lead to a death sentence versus life imprisonment without parole).

116. See *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (barring death sentences for crimes committed by juveniles). Connecticut's only known execution of a juvenile was in 1786, when it executed a twelve-year-old Native American girl for murder. DEATH PENALTY INFO. CTR., EXECUTIONS IN THE U.S. 1608–2002: THE ESPY FILE (2002), <http://www.deathpenaltyinfo.org/documents/ESPYstate.pdf>.

117. CONN. GEN. STAT. ANN. § 53a-35a(1)(B).

118. S.B. 796, Gen. Assemb., Jan. Sess. (Conn. 2015).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

counsel for indigent inmates a year in advance of their parole hearing.¹²³ By its own terms, the law is explicitly retroactive.¹²⁴

The following chart outlines forms of abolition since *Miller*, its effective date, and whether abolition is retroactive.

Table 1: Abolition of JLWOP Since Miller

State	Removes Sentencing Possibility	Adds Parole Eligibility	Explicitly Retroactive	Effective Date
Connecticut ¹²⁵	X	X	X	Oct. 1, 2015
Delaware ¹²⁶		X ¹²⁷	X	June 4, 2013
Hawaii ¹²⁸	X			July 2, 2014
Massachusetts ¹²⁹	X			July 25, 2014
Nevada ¹³⁰	X	X		Oct. 1, 2015
Texas ¹³¹	X			Sept. 1, 2013

123. *Id.*

124. *Id.*

125. *Id.*

126. S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013).

127. Delaware provides for judicial review, rather than review before a parole board. *Id.*

128. H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014) (amending HAW. REV. STAT. ANN. §§ 706-656(1), 657 (LexisNexis Supp. 2014)); § 706-670 (providing for appointed counsel in annual parole hearings and a presumption in favor of parole upon finding a low risk of reoffending).

129. MASS. GEN. LAWS ANN. ch. 119, § 72(a) (West 2015) (amended by H.B. 4307 188th Gen. Ct. (Mass. 2014)) (ensuring that incarcerated juveniles are fully able to take part in educational and treatment programs or to be placed in a minimum-security facility; protections which are not afforded to adult inmates); MASS. GEN. LAWS ANN. ch. 265, § 2 (amended by H.B. 4307, 188th Gen. Ct. (Mass. 2014)). Massachusetts's legislative abolition was subsequent to the state supreme court's holding, as a matter of state law, that discretionary imposition of JLWOP was unconstitutional. *See* Diatchenko v. Dist. Att'y (*Diatchenko I*), 1 N.E.3d 270, 284–85 (Mass. 2013). More recently, the state supreme court has held that indigent inmates sentenced to JLWOP are entitled to counsel and expert services related to their parole hearings. *See* Diatchenko v. Dist. Att'y (*Diatchenko II*), 27 N.E.3d 349, 356–57 (Mass. 2015).

130. NEV. REV. STAT. ANN. § 176.025 (LexisNexis Supp. 2013) (amended by A.B. 267, 78th Sess. (Nev. 2015)) (requiring consideration of the mitigating aspects of youth anytime a juvenile is sentenced as an adult, and rendering prisoners who are currently serving JLWOP sentences eligible for parole as follows: (A) if the offense did not result in death, the prisoner is eligible for parole after fifteen years of being incarcerated; (B) if the offense did result in death, after twenty years of incarceration). Nevada's retroactivity provision does not apply to persons "convicted of an offense or offenses that resulted in the death of two or more victims." A.B. 267, 78th Sess. (Nev. 2015).

West Virginia ¹³²	X	X ¹³³		June 6, 2014
Wyoming ¹³⁴	X	X	X	July 1, 2013
Vermont ¹³⁵	X			May 14, 2015

Both forms of abolition have the same effect. They indicate legislative thinking on the practice, the “clearest and most reliable objective evidence of contemporary values.”¹³⁶ When Hawaii banned JLWOP, its legislature declared, “Youthfulness both lessens a juvenile’s moral culpability and enhances the prospect that, as the youth matures into an adult and neurological development occurs, the individual can become a contributing member of society.”¹³⁷ The legislatures in these states have explicitly declared their objections to JLWOP.

The states barring JLWOP are fewer than the Court counted in *Atkins* when it barred imposing the death penalty on the intellectually disabled.¹³⁸ However, the “consistency [and] direction” of the change in JLWOP policy is as strong or stronger than in cases where

131. TEX. PENAL CODE ANN. § 12.31(a)(1) (West 2015) (passed in June 2013).

132. H.B. 4210, 81st Leg., 2d Sess. (W. Va. 2014) (enacting W. VA. CODE ANN. § 61-11-23 (LexisNexis Supp. 2014)). West Virginia’s law also requires “the parole board [to] take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration.” § 62-12-13b(b).

133. All persons “convicted of one or more offenses for which the sentence or any combination of sentences imposed is for a period that renders the person ineligible for parole until he or she has served more than fifteen years shall be eligible for parole after he or she has served fifteen years if the person was less than eighteen years of age at the time each offense was committed.” § 61-11-23(b).

134. WYO. STAT. ANN. §§ 6-2-101(b), 6-10-301(c), 7-13-402 (2015) (outlawing JLWOP both by amending the first-degree murder scheme as applied to juveniles and by making those serving JLWOP parole eligible unless they have, while incarcerated for JLWOP, committed assault with a deadly weapon on a law enforcement officer or attempted an escape).

135. H.B. 62, 2015 Leg., Reg. Sess. (Vt. 2015) (enacting VT. STAT. ANN. 13, § 7045 (2015)). See E-mail from David Turner, Vt. Dep’t of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (June 1, 2015, 05:50 AM) (on file with author) (noting that Vermont had no one serving JLWOP at the time of passage, and, therefore, retroactivity is unlikely to be an issue).

136. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

137. H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014).

138. *Atkins*, 536 U.S. at 313–15 (detailing that prior to *Penry*, only Georgia and Maryland prohibited the death penalty for the intellectually disabled but that after *Penry*, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, North Carolina, and Texas also banned the practice).

the Court has addressed the issue.¹³⁹ In the thirteen years between *Penry* and *Atkins*, sixteen states eliminated the death penalty for the intellectually disabled.¹⁴⁰ In the fifteen years between *Stanford*¹⁴¹ and *Roper*,¹⁴² five states eliminated the death penalty for juveniles.¹⁴³ The elimination rate for these respective punishments was roughly 1.23 and 0.33 jurisdictions per year.¹⁴⁴

In the years since *Miller*, the states' responses have been much quicker. On average 3.33 states per year have eliminated JLWOP, and six jurisdictions have eliminated the punishment since June 2014.¹⁴⁵ In response to *Miller*, a case that merely restricts the punishment, states are eliminating JLWOP all together, suggesting that *Miller* has caused states to examine their sentencing practices and, once scrutinized, abolish them.¹⁴⁶ Moreover, as in *Atkins* and *Roper*, no state without JLWOP has chosen to enact it, and no state has expanded its application.¹⁴⁷ The direction, consistency, and rate of change all suggest a mounting consensus against JLWOP.

States that have retained JLWOP after *Miller* blunted its impact by granting resentencing hearings to inmates subject to mandatory JLWOP sentences and by narrowing the reach of their JLWOP schemes. At least sixteen state courts have held that *Miller* provides retroactive relief to juveniles whose sentences are final,¹⁴⁸ with some

139. *Id.* at 315.

140. *Roper v. Simmons*, 543 U.S. 551, 565 (2005).

141. 492 U.S. 361 (1989).

142. 543 U.S. 551.

143. *Id.* at 565.

144. *See id.* (noting that in thirteen years, sixteen states eliminated the death penalty for the intellectually disabled, or 1.23 states per year, and showing that five states in fifteen years eliminated the death penalty for juveniles).

145. *See supra* notes 125–32 and accompanying text.

146. *See Graham v. Florida*, 560 U.S. 48, 66–67 (2010) (noting that existence of the possibility of a sentence via a provision transferring juveniles to adult court does not amount to an acceptance of the range of sentencing outcomes that a juvenile would be subject to in adult court).

147. *See supra* Table 1; notes 125–35 and accompanying text (discussing the number of states that have abolished or restricted application of JLWOP); *infra* notes 148–68 and accompanying text (discussing further how some states have limited use of JLWOP beyond what *Miller* requires).

148. *See Kelley v. Gordon*, 2015 Ark. 277 at 6, 465 S.W.3d 842, 846 (Ark. 2015) (holding that fundamental fairness requires retroactive application of *Miller*), *cert. denied*, 2016 WL 854232 (U.S. Mar. 7, 2016); *State v. Randles*, 334 P.3d 730, 732–33 (Ariz. Ct. App. 2014) (same), *cert. denied*, No. CR-14-0306-PR, 2015 Ariz. LEXIS 126 (Ariz. Apr. 21, 2015); *In re Rainey*, 168 Cal. Rptr. 3d 719, 724 (Cal. Ct. App. 2014) (same), *cert. granted*, 326 P.3d 251 (Cal. 2014); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1035 (Conn. 2015) (same), *cert. denied*, 2016 WL 854311 (U.S. Mar. 7, 2016);

explicitly doing so on state law grounds.¹⁴⁹ Four of those states passed legislation to ensure that *Miller* would apply retroactively.¹⁵⁰ As discussed in more detail below, these retroactivity holdings mean that scores of inmates were already entitled to resentencing hearings, even before the Court's ruling in *Montgomery*.¹⁵¹

Countless more will not be subject to JLWOP because of states' substantive limitations on the reach of their JLWOP sentencing schemes.¹⁵² For example, before a recent overhaul to its JLWOP policies, California made juveniles eligible for JLWOP if any one of

Falcon v. State, 162 So. 3d 954, 956 (Fla. 2015) (same); People v. Davis, 6 N.E.3d 709, 722–23 (Ill. 2014) (same), *cert. denied*, 135 S. Ct. 710 (2014); State v. Ragland, 836 N.W.2d 107, 121–22 (Iowa 2013) (same); *Diatchenko I*, 1 N.E.3d 270, 281 (Mass. 2013) (same); Jones v. State, 122 So. 3d 698, 702 (Miss. 2013) (en banc) (same); Branch v. Cassady, No. WD77788, 2015 WL 160718, at *5 (Mo. Ct. App. Jan. 13, 2015) (same); State v. Mantich, 842 N.W.2d 716, 724 (Neb. 2014) (same), *cert. denied*, 135 S. Ct. 67 (2014); *In re State*, 103 A.3d 227, 236 (N.H. 2014) (same), *cert. denied sub nom.*, New Hampshire v. Soto, 2016 WL 854309 (U.S. Mar. 7, 2016); Aiken v. Byars, 765 S.E.2d 572, 576 (S.C. 2014) (same), *cert. denied*, 135 S. Ct. 2379 (2015); Dickerson v. State, 2014 WL 3744454, at *4 (Tenn. Crim. App. July 28, 2014) (same); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014) (same); State v. Mares, 335 P.3d 487, 508 (Wyo. 2014) (same).

149. See *Randles*, 334 P.3d at 732 (finding that *Miller* applies retroactively according to the plain language of Arizona's amended statutes); *Falcon*, 162 So. 3d at 963–64 (finding *Miller* retroactive under its own three-prong *Witt* analysis); *Branch*, 2015 WL 160718, at *6 (finding that *Miller* applies retroactively under Missouri's adoption of the broader *Linkletter-Stovall* test).

150. See WYO. STAT. ANN. § 7-13-402(a)–(b) (2015) (denying retroactive application to prisoners who either assaulted a prison guard while in custody or attempted to escape); *Randles*, 334 P.3d at 732 (finding resentencing for *Miller* relief applies retroactively according to the plain language of Arizona's amended statutes); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013); S.B. 5064, 63d Leg., 2013 Reg. Sess. (Wash. 2013) (amending WASH. REV. CODE ANN. §§ 9.94A.510, -.540, -.6332, -.729, 9.95.425, -.430 (West Supp. 2015)).

151. At least two states have granted retroactive relief to persons serving discretionary JLWOP sentences. Those states held that the sentences violated *Miller* because the statutory schemes at the time did not require consideration of youth as a mitigating factor. See *State v. Long*, 8 N.E.3d 890, 894–99 (Ohio 2014) (agreeing with the U.S. Supreme Court that juveniles who commit criminal offenses are not as culpable as adults); *Aiken*, 765 S.E.2d at 576–77 (entitling youth with JLWOP sentences to a resentencing hearing in which age will be considered as a mitigating factor).

152. See *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (entitling a juvenile to present mitigating evidence as part of his case for a sentence less than JLWOP, and observing that once such information is meaningfully presented, the Court expects imposition of JLWOP sentences “will be uncommon”); see also MISS. STATE PUB. DEF., OFFICE OF CAPITAL DEF. COUNSEL, MONTHLY ACTIVITIES REPORT 8–9 (May 2015) [hereinafter MISSISSIPPI MONTHLY ACTIVITIES REPORT] (on file with author) (observing that data from Mississippi support the Court's hypothesis in *Miller* that a significant portion of JLWOP resentencing cases result in a sentence less than JLWOP).

twenty-two special circumstances existed, circumstances that are present in almost every first-degree murder case.¹⁵³ In 2012, California dramatically narrowed JLWOP eligibility.¹⁵⁴ Under the revised statute, a person serving can “submit to the sentencing court a petition for recall and resentencing” after serving fifteen years, unless the JLWOP sentence is “for an offense where the defendant tortured . . . [the] victim” or where “the victim was a public safety official.”¹⁵⁵

If the petition is not granted, the inmate has additional opportunities to petition again after serving a total of twenty and twenty-five years.¹⁵⁶ This change in policy dramatically limits the scope of JLWOP,¹⁵⁷ transforming California from having one of the most widely applicable JLWOP schemes to having one of the narrowest.¹⁵⁸

California is not alone. Florida has passed similar legislation,¹⁵⁹ and three additional states—North Carolina, Pennsylvania, and Washington—have eliminated JLWOP for a class of offenders.¹⁶⁰ North Carolina eliminated JLWOP for felony murder, restricting the sentence to persons convicted of premeditated and deliberate first-degree murder.¹⁶¹ Pennsylvania eliminated JLWOP as an option for

153. See CAL. PENAL CODE § 190.2 (West 2014) (enumerating special circumstances, including felony murder). See generally Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1287 (1997) (noting that California’s death penalty eligibility, which set the criteria for JLWOP sentences, is “arguably the broadest such scheme in the country”).

154. CAL. PENAL CODE § 1170(d)(2)(A)(i)–(ii) (West 2015).

155. *Id.*

156. *Id.* § 1170(d)(2)(A), (H).

157. Of course, California continues to authorize JLWOP in name for a broad array of homicide offenses. However, as this discussion demonstrates, most of the persons technically subject to JLWOP will, in fact, have the opportunity to be paroled.

158. See generally PHILLIPS BLACK PROJECT, JUVENILE LIFE WITHOUT PAROLE AFTER MILLER V. ALABAMA 2–3, <https://www.phillipsblack.org/s/Juvenile-Life-Without-Parole-After-Miller.pdf> (describing JLWOP availability in each authorizing jurisdiction). While examining the case files of the 288 people presently serving JLWOP sentences in California would provide a means for examining how much narrower California’s amended statute actually is, such an undertaking was beyond the scope of this project.

159. H.B. 7035, 2014 Leg., Reg. Sess. (Fla. 2014) (enacting FLA. STAT. ANN. §§ 775.082(1)(b), 921.1401 (West Supp. 2015)).

160. The Eastern District of Michigan has also ruled that Michigan’s parole statute is unconstitutional because it permits JLWOP pursuant to Michigan’s old mandatory JLWOP sentencing scheme. See MICH. COMP. LAWS ANN. § 769.25 (West Supp. 2014); *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *1 (E.D. Mich. Jan. 30, 2013) (declining to address retroactivity, but nonetheless providing many inmates sentenced prior to Michigan’s change in JLWOP sentencing with an opportunity for release), *appeal filed*, No. 13-2705 (6th Cir. Dec. 20, 2013).

161. N.C. GEN. STAT. §§ 14-17(a), 15A-1340.19B (2013).

juveniles convicted of second-degree murder, whereas prior to the amendment second-degree murder called for automatic JLWOP.¹⁶² Finally, Washington retroactively eliminated JLWOP for individuals who were under sixteen when they committed their crimes.¹⁶³

Illinois and New Hampshire have both recently raised the jurisdictional age for adult court eligibility, limiting the availability of JLWOP and other adult sentences for juvenile offenders in those states.¹⁶⁴ Connecticut and Massachusetts have also recently raised their jurisdictional age.¹⁶⁵ Other states have either eliminated mandatory minimums for juveniles,¹⁶⁶ required consideration of the mitigating aspects of youth before sentencing a juvenile to a lengthy term,¹⁶⁷ or improved the reliability of parole hearings.¹⁶⁸ Each

162. 18 PA. CONS. STAT. § 1102.1(c) (Supp. 2012); *Commonwealth v. Batts*, 66 A.3d 286, 293 (Pa. 2013) (vacating a JLWOP sentence and remanding for further consideration under the new statutory scheme).

163. WASH. REV. CODE ANN. § 10.95.030(3)(a)(i) (Supp. 2015).

164. See H.B. 2404, 98th Gen. Assemb., Reg. Sess. (Ill. 2013) (amending 705 ILL. COMP. STAT. ANN. § 405/5-120 (West 2015)) (changing jurisdictional age from seventeen to eighteen); H.B. 305, 2015 Leg., Reg. Sess. (N.H. 2015) (amending N.H. REV. STAT. ANN. 169-B:4 (Supp. 2014)) (changing jurisdictional age from sixteen to seventeen).

165. See H.B. 6638, 2011 Gen. Assemb., Reg. Sess. (Conn. 2011) (amending CONN. GEN. STAT. ANN. § 46b-121 (Supp. 2015)) (changing jurisdictional age to eighteen); H.B. 1432, 188th Gen. Court, Spec. Sess. (Mass. 2013) (amending MASS. GEN. LAWS ANN. ch. 119, § 72 (West 2015) (changing jurisdictional age from seventeen to eighteen)).

166. See *State v. Lyle*, 854 N.W.2d 378, 389 (Iowa 2014) (“[T]he legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal.” (quoting *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403–04 (2011))); see also *State v. Taylor*, 854 N.W.2d 420, 421 (Iowa 2014) (finding a mandatory minimum sentence “cruel and unusual punishment” under the Iowa state constitution).

167. See *Casiano v. Comm’r of Corr.*, 115 A.3d 1031, 1047–48 (Conn. 2015) (holding that courts must consider mitigating features of youth before imposing a fifty-year sentence); *People v. Sanders*, No. 1-12-1732, 2014 WL 7530330, at *9, *10 (Ill. App. Ct. 2014) (asserting the trial court should have considered mitigating features of youth before imposing consecutive forty and thirty-year sentences); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (holding that sentencing courts are required to consider youth as a mitigating factor for a sentence that would end when the juvenile was in his sixties, explaining “[e]ven if lesser sentences than life without parole might be less problematic, we do not regard the juvenile’s potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*”).

168. See CAL. PENAL CODE §§ 3041, 3046, 4801 (West 2011) (setting standards for review of cases in parole hearings); CONN. GEN. STAT. § 54-125a (West, Westlaw through 2015 Reg. Sess.) (entitling indigent persons sentenced for juvenile offenses to counsel to assist in preparation for parole hearings); DEL. CODE ANN. tit. 11 § 4204A(d) (Supp. 2014) (setting time guidelines for parole hearings based on age and the crime committed); FLA. STAT. ANN. §§ 775.081(1)(b), 921.1402 (West 2014)

change signals a growing intention to treat juveniles differently from adults, even if they are somewhat modulated for purposes of assessing a national consensus on JLWOP.

States are rapidly abandoning and limiting the availability of JLWOP. The direction, consistency, and speed of the change manifest a growing consensus against the practice.

C. JLWOP Actual Sentencing Practices Demonstrate It Is an Outdated, Disfavored Practice, Disproportionately Imposed on Children of Color

Careful review of the actual JLWOP sentencing practices in the states that retain JLWOP reflects its diminishing role in juvenile justice. The imposition of JLWOP sentences over time demonstrates that the overwhelming majority of JLWOP sentences were imposed in the mid-1990s in a handful of jurisdictions pursuant to policies adopted at the height of fear over the myth of the superpredator.¹⁶⁹

1. Most JLWOP sentences were imposed in the mid-1990s

Current JLWOP sentences were overwhelmingly imposed during the mid-1990s. As discussed below, this was an era when forty-five states changed their laws¹⁷⁰ during hysteria over a “coming generation of super-predators.”¹⁷¹ The change in laws expanded the applicability of JLWOP. This period saw a marked increase in JLWOP sentences, despite a *drop* after 1994 in homicides committed by juveniles.¹⁷² The criminal justice policies of the 1990s track the number of JLWOP sentences being served.

(entitling juveniles sentenced to terms greater than fifteen years to sentencing review after fifteen, twenty, or twenty-five years); NEB. REV. STAT. § 83-1,110.04(1) (2014) (entitling persons who were sentenced when they were less than eighteen to have an adverse parole decision revisited annually and in light of enumerated factors); W. VA. CODE ANN. § 62-12-13(b) (LexisNexis Supp. 2015) (requiring parole boards to consider the mitigating circumstances of youth when making parole decisions); *see also Diatchenko II*, 27 N.E.3d 349, 353 (Mass. 2015) (holding that indigent juvenile offenders are entitled to counsel and expert assistance to ensure meaningful opportunity for release pursuant to parole board decisions).

169. *See infra* Part III.

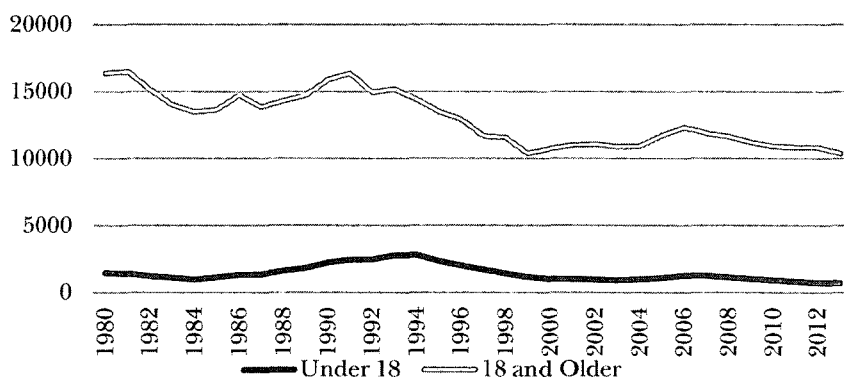
170. JESSICA SHORT & CHRISTY SHARP, CHILD WELFARE LEAGUE OF AM., DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 7 (2005), <http://66.227.70.18/programs/juvenilejustice/disproportionate.pdf>.

171. *Hearings on the Juvenile Justice and Delinquency Prevention Act Before the Subcommittee on Early Childhood, Youth & Families of the H. Comm. on Econ. & Educ. Opportunities*, 104th Cong. 89–90 (1996) (statement of Rep. Bill McCollum, Chairman, Subcomm. on Crime, H. Judiciary Comm.).

172. SHORT & SHARP, *supra* note 170, at vi.

The nation's focus on the generation of superpredators is curious in light of the proportion of homicides committed by juveniles. As demonstrated in the figure below, in any era, including the period in which states changed their juvenile laws, adult homicide arrests dwarf the number of juvenile homicide arrests, and juvenile homicide arrests generally trend in the same direction as adult homicide arrests.

*Figure 1: Number of Juveniles and Adults Arrested for Homicide Between 1980 and 2013*¹⁷³



Nonetheless, the imposition of JLWOP sentences increased, even as homicide rates fell.¹⁷⁴ Between 1986 and 1994, arrests for violent crimes committed by juveniles, including homicide, rose.¹⁷⁵ However, that rate fell sharply between 1994 and 2000, even as JLWOP sentences were peaking.¹⁷⁶ Moreover, the rise in juvenile homicide arrests in the 1980s and early 1990s might be better understood as “narrower bands of behavior,” specifically “a thin band of highly lethal gun attacks . . . and garden variety assaults” than as a national crime wave.¹⁷⁷ Under either analysis, the rise in JLWOP sentences was not concurrent with the rise in juvenile homicides, and juvenile homicides made up only a small fraction of all homicide

173. *Easy Access to the FBI's Supplementary Homicide Reports: 1980–2013*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/ojstatbb/ezashr> (select “Known Offender Crosstabs” hyperlink, then select “Year of Incident” as the “Row Variable” and “Age of Offender” as the “Column Variable”).

174. *See id.*

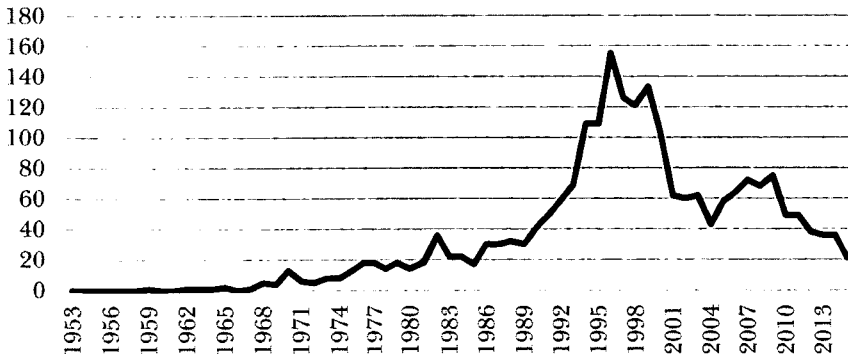
175. *Id.*

176. *Id.*

177. Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality*, 33 WAKE FOREST L. REV. 727, 728 (1998).

arrests.¹⁷⁸ Thus, the emphasis on changing juvenile sentencing policies arrived during a period of waning juvenile violence.¹⁷⁹

Figure 2: Number of Juveniles Sentenced to Life Without Parole Per Year¹⁸⁰



There is a sharp uptick in the imposition of JLWOP sentences during the same period of rapid expansion of JLWOP eligibility. This upswing occurred despite juvenile homicide arrests falling in the same timeframe.¹⁸¹ The percent of life without parole sentences per homicide arrest was between one percent and two percent from 1980 to 1993.¹⁸² Between 1994 and 1999, the rate of JLWOP sentences increased, and in 1999, eleven percent of juveniles arrested for homicide were sentenced to JLWOP.¹⁸³ Likewise, the rate of JLWOP sentences per homicide arrest remained at or above four percent until 2013, the most recent year for which the homicide arrest data is available.¹⁸⁴ While the increased imposition of JLWOP sentences does not track an increase in crime, it follows a change in juvenile justice policies that expanded its applicable scope.

178. *Id.* at 742.

179. *Id.* at 744.

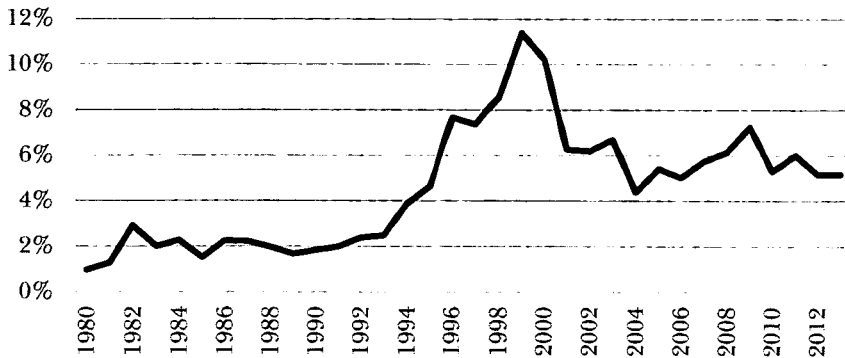
180. This information comes from responses to the authors' FOIA requests and is on file with the authors. See *infra* Appendix A (detailing the results of authors' FOIA requests and the limitations of the authors' data collection).

181. See Zimring, *supra* note 177, at 742; *supra* notes 173–77 and accompanying text.

182. This information was compiled by comparing responses to the authors' FOIA requests to statistics available in the FBI's SHR. Responses to the authors' FOIA request are on file with the authors. See *Supplementary Homicide Reports*, *supra* note 108.

183. *Id.*; *supra* Figure 2.

184. *Supplementary Homicide Reports*, *supra* note 108; *supra* Figure 2.

*Figure 3: Rate of JLWOP Sentences Per Juvenile Arrest for Homicide*¹⁸⁵

A handful of jurisdictions—California, Florida, Louisiana, Michigan, and Pennsylvania—are responsible for imposing two-thirds of all JLWOP sentences.¹⁸⁶ Amidst the nationwide changes to juvenile sentencing policies, these key jurisdictions made changes to their laws expanding eligibility for JLWOP. In 1991, Louisiana required juveniles as young as fifteen to be tried as adults for certain crimes, including homicide.¹⁸⁷ In 1995, Pennsylvania specified that all juveniles charged with murder would be tried as adults.¹⁸⁸ In 1996, Michigan extended adult jurisdiction to juveniles as young as fourteen.¹⁸⁹ Finally, Florida and California have both made multiple changes to the way they impose JLWOP. In 1994, Florida lowered its age of eligibility for transfer to adult court for serious offenses to fourteen years old.¹⁹⁰ In 1997, Florida required that all juveniles indicted for a crime carrying JLWOP as a potential sentence be tried as adults.¹⁹¹

Since 1976, California has placed every person less than eighteen-years-old under the jurisdiction of the juvenile court and gave that

185. This information was compiled by comparing responses to the authors' FOIA requests to statistics available in the FBI's SHR. Responses to the authors' FOIA request are on file with the authors. See *supra* Figures 1–2.

186. See *infra* Appendix B.

187. LA. CHILD. CODE ANN. art. 305 (2014) (enacted by H.B. 939, 1991 Leg., Reg. Sess. (La. 1991)).

188. 42 PA. CONS. STAT. § 6302 (Supp. 2012) (enacted by S.B. 100, 179th Gen. Assemb., 1st Spec. Sess. (Pa. 1995)).

189. MICH. COMP. LAWS § 600.606 (2015) (enacted by H.B. 4486, 1996 Leg., Reg. Sess. (Mich. 1996)).

190. 1994 FLA. LAWS 1240 (amending FLA. STAT. § 39.049 (1993)). See generally Michael Dale, *Juvenile Law: 1994 Survey of Florida Law*, 19 NOVA L. REV. 139, 140 (1994) (exploring changes to Florida law made during the 1994 legislative session).

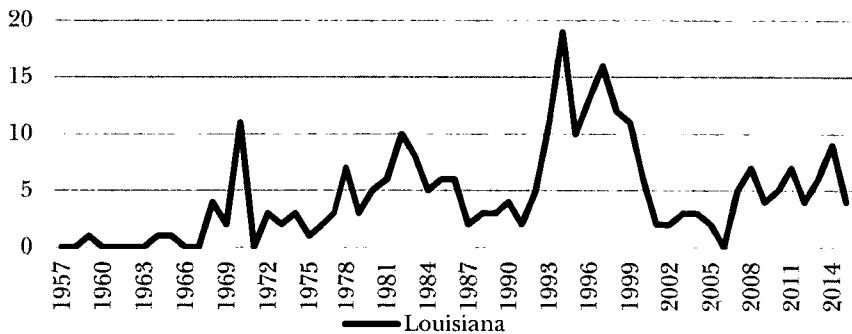
191. FLA. STAT. ANN. § 985.56(1) (West 2014) (enacted by H.B. 1369, 15th Leg., Reg. Sess. (Fla. 1997)).

court discretion to decide whether a juvenile was unfit to proceed in juvenile court, listing some offenses where the juvenile was presumed to be unfit.¹⁹² If the juvenile was sixteen or older and committed certain offenses, including those carrying a JLWOP sentence, the adult court was presumed to have jurisdiction.¹⁹³ In 2000, via Proposition 21, California removed that discretion and mandated that all juveniles ages fourteen through seventeen indicted for certain crimes, including all crimes carrying JLWOP as a potential sentence, be tried as adults.¹⁹⁴

A review of California, Florida, Louisiana, Michigan, and Pennsylvania's sentencing practices confirms that JLWOP sentences in these high-use jurisdictions were affected by changes to the states' juvenile sentencing policies.

Louisiana's JLWOP sentences dramatically increased after its 1991 expansion of JLWOP eligibility.¹⁹⁵

Figure 4: JLWOP Sentences in Louisiana¹⁹⁶



Michigan expanded its juvenile transfer laws in 1996, broadening the scope of JLWOP there.¹⁹⁷ Michigan is a notable exception in that

192. CAL. WELF. & INST. CODE §§ 602, 607 (West Supp. 2015) (amended by 1976 Cal. Stat. 4819); *People v. Cardona*, 99 Cal. Rptr. 3d 313, 317–20 (Ct. App. 2009).

193. CAL. WELF. & INST. CODE § 602; *Cardona*, 99 Cal. Rptr. 3d at 317–20.

194. CAL. WEL. & INST. CODE § 602(b) (amended by 2000 CAL. LEGIS. PROP. 21, <http://vigarchive.sos.ca.gov/2000/primary/propositions/21text.htm>); see also *Cardona*, 99 Cal. Rptr. 3d at 317–19 (applying the new statutory framework).

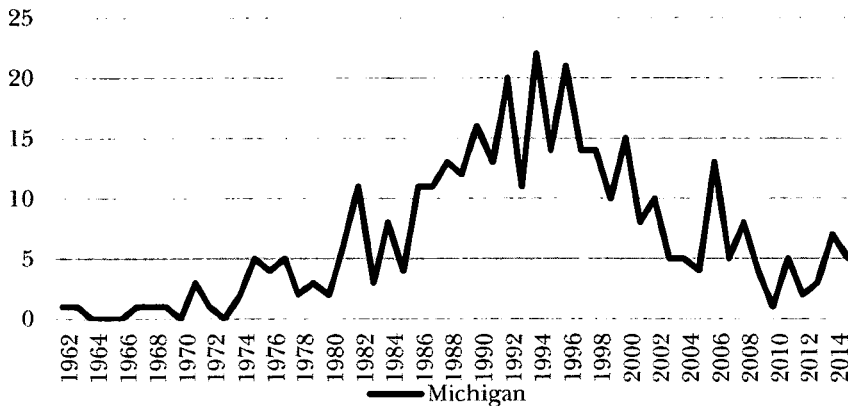
195. See LA. CHILD. CODE ANN. art. 305 (2014) (enacted by H.B. 939, 1991 Leg., Reg. Sess. (La. 1991)); E-mail from Genie Powers, La. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 13, 2015, 3:11 PM) (on file with author) (providing a complete list of all persons serving JLWOP sentences).

196. *Id.*; see also *infra* Appendix B (reporting that 247 individuals are serving JLWOP sentences in Louisiana).

197. MICH. COMP. LAWS § 600.606 (2015) (enacted by H.B. 4486, 1996 Leg., Reg. Sess. (Mich. 1996)).

its JLWOP sentences sharply increased prior to the change broadening JLWOP's potential impact. However, as discussed below, Michigan's peak in the mid-1990s is in keeping with other social and political change that was underway throughout the country.

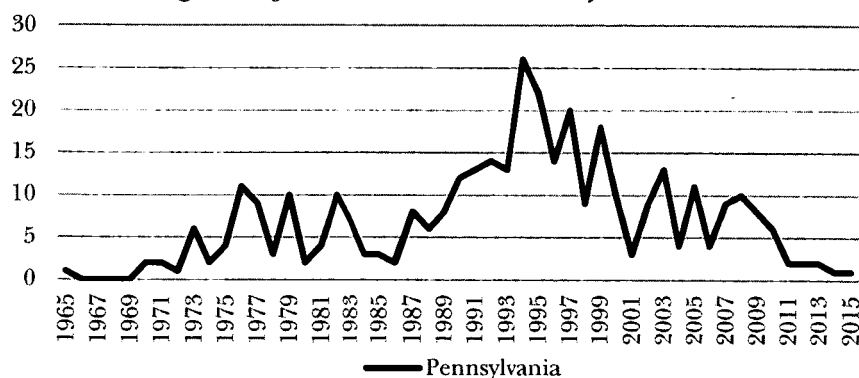
Figure 5: JLWOP Sentences in Michigan¹⁹⁸



198. See E-mail from Andrew Phelps, Assistant FOIA Coordinator, Mich. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Oct. 20, 2015, 2:43 PM) (on file with author) (providing a complete list of all JLWOP sentences in Michigan); Appendix B (reporting that 370 individuals are serving JLWOP sentences in Michigan).

Pennsylvania saw a spike in JLWOP sentences after requiring all juveniles charged with homicide to be tried as adults.¹⁹⁹

*Figure 6: JLWOP Sentences in Pennsylvania*²⁰⁰



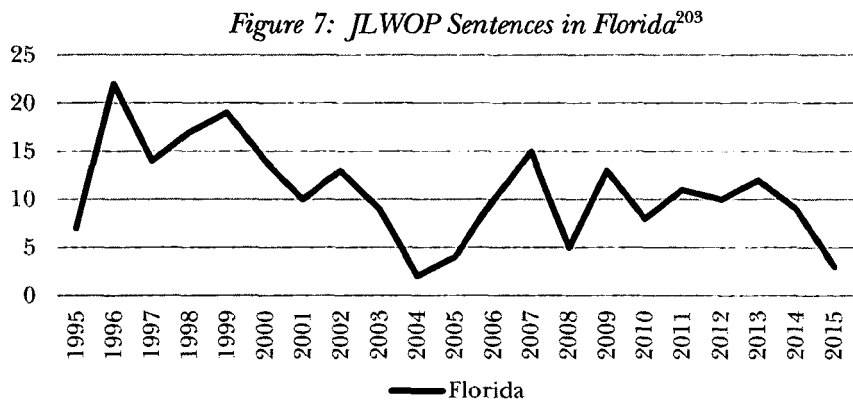
There are no JLWOP sentences being served in Florida that were imposed before the state changed its transfer laws in 1994, when it lowered its age of eligibility for transfer to adult court for serious offenses to fourteen years old.²⁰¹ Florida's JLWOP sentences spiked after 1997, when it required all juveniles charged with an offense carrying a potential sentence of JLWOP to be tried as adults.²⁰²

199. See 42 PA. CONS. STAT. § 6302 (Supp. 2012) (enacted by S.B. 100, 179th Gen. Assemb., 1st Spec. Sess. (Pa. 1995)); E-mail from Andrew Filkosky, Agency Open Records Officer, Pa. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 3, 2015, 9:00 AM) (on file with author) (providing a complete list of all persons serving JLWOP sentences in Pennsylvania).

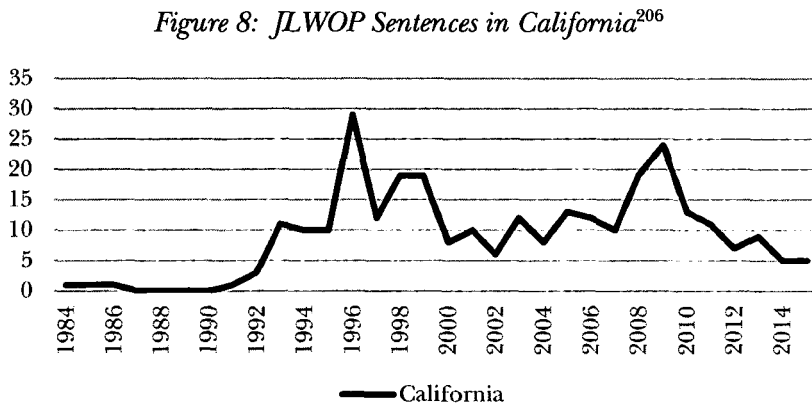
200. E-mail from Andrew Filkosky, Agency Open Records Officer, Pa. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 3, 2015, 9:00 AM) (on file with author) (providing a complete list of all persons serving JLWOP sentences in Pennsylvania); see also *infra* Appendix B (reporting that 414 individuals are serving JLWOP sentences in Pennsylvania).

201. E-mail from Dena French, Fla. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (June 30, 2015, 10:29 AM) (on file with author) (providing a complete list of all persons serving JLWOP sentences in Florida).

202. *Id.*; see also FLA. STAT. ANN. § 985.56(1) (West 2014) (enacted by H.B. 1369, 15th Leg., Reg. Sess. (Fla. 1997)).



Finally, California’s expansion of adult jurisdiction in 2000 and the concomitant expansion of JLWOP eligibility produced more JLWOP sentences there.²⁰⁴ Its earlier upswing in the mid-1990s may reflect a change in the number of transfers being sought, the number being granted, or the number of cases affected by presumptive transfer.²⁰⁵ Regardless, the uptick reflects the national trend: a mid-1990s upswing in imposition of JLWOP sentences.



203. *Id.*; see also *infra* Appendix B (reporting that 227 individuals are serving JLWOP sentences in Florida).

204. See *supra* note 192–94.

205. See SHORT & SHARP, *supra* note 170, at 7 (describing the uptick in juvenile transfers throughout the United States during 1990s).

206. Email from June DeVoe, Research Manager, Data Analysis Unit, Cal. Dep’t of Corr. & Rehab., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 14, 2015, 12:47 PM) (on file with author) (providing a complete list of all persons serving JLWOP sentences in California); see also *infra* Appendix B (reporting that 288 individuals are serving JLWOP sentences in California).

The sentencing practices in these jurisdictions confirm that JLWOP sentences increased generally at the same time that states undertook changes to their juvenile justice policies. These changes took place despite little apparent relationship to actual changes in homicide rates.

2. *Recent policy changes limit the ongoing impact of JLWOP, including in the jurisdictions that retain it and have used the sentence the most*

Changes in state juvenile sentencing policy will likely limit the ongoing impact of JLWOP sentences, independent of *Montgomery*'s effect,²⁰⁷ as states abandon the policies they enacted during the height of JLWOP sentencing. Since *Miller*, six states have abolished JLWOP.²⁰⁸ Among the states that retain the sentence, substantial restrictions limit its impact. California, Florida, and Pennsylvania, three of the top five users of JLWOP, have each recently passed significant reforms to their JLWOP laws, narrowing their applicability.²⁰⁹ In Michigan—also among the top five—the state's failure to provide a meaningful opportunity for release has been held unconstitutional, with an appeal pending.²¹⁰ The particular effects of these reforms remain to be seen, but some of the most frequent users of the sentence are restricting their use of the practice.

Moreover, accounting for both retroactivity holdings requiring resentencing and substantive reforms to statutes, the true number of persons subject to JLWOP is likely far lower than the 2295 reported by the departments of corrections.²¹¹ This subsection details the impact of recent reforms on the number of persons serving valid JLWOP sentences.

207. The impact of *Montgomery* is beyond the scope of this Article. However, at least some early commentary on the decision suggests that *Montgomery* is an expansion of *Miller*, potentially applying even to discretionary sentences of life without parole. See, e.g., Lyle Denniston, *Opinion Analysis: Further Limit on Life Sentences for Youthful Criminals*, SCOTUSBLOG (Jan. 25, 2016, 12:26 PM), <http://www.scotusblog.com/2016/01/opinion-analysis-further-limit-on-life-sentences-for-youthful-criminals> ("[T]he ruling's clarification—or, apparently, its expansion—of *Miller* will now rule out all life-without-parole sentences for juveniles who commit crimes before age of eighteen, unless prosecutors can prove to a judge that a particular youth is beyond saving as a reformed person.").

208. See *supra* Section II.B (describing the two ways that states have abolished JLWOP both before and after *Miller*).

209. See *supra* notes 157–60 and accompanying text (highlighting a shift to limiting JLWOP eligibility in these states).

210. *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *1 (E.D. Mich. Jan. 30, 2013), *appeal docketed*, No. 13-2661 (6th Cir. Dec. 13, 2013).

211. See *infra* note 215.

Prior to *Montgomery*, thirteen states had either passed legislation or issued final retroactivity rulings that may entitle inmates serving JLWOP sentences entered prior to the respective jurisdictions' post-*Miller* change in sentencing practices to a new sentencing proceeding.²¹² Five hundred and ninety-two persons are currently serving a sentence of JLWOP in those states, and, as a result of these holdings, may have an opportunity for a new sentencing proceeding. Five hundred and ninety-two, however, likely overstates the scope of potential resentencing proceedings because, for example, some states have restricted their retroactive relief to exclude narrow categories of JLWOP sentences.²¹³ An additional 354 persons are serving JLWOP sentences in Michigan for convictions imposed prior to eliminating mandatory JLWOP in 2014 and will be eligible for parole if the U.S. Court of Appeals for the Sixth Circuit affirms a lower court decision providing every person sentenced to Michigan's mandatory JLWOP with an opportunity to seek parole.²¹⁴ Depending on how frequently JLWOP

212. Juveniles serving JLWOP sentences in Delaware, Washington, Wyoming, Arizona, Arkansas, Florida, Illinois, Iowa, Mississippi, Nebraska, South Carolina, Massachusetts, and Texas may have been entitled to new sentencing proceedings even before the Court's ruling in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). WYO. STAT. ANN. § 7-13-402(a) (2015); *State v. Randles*, 334 P.3d 730, 732–33 (Ariz. Ct. App. 2014) (holding that Arizona's statutory amendments applied retroactively and required the court to modify a JLWOP defendant's sentence), *cert. denied*, No. CR-14-0306-PR, 2015 Ariz. LEXIS 126 (Ariz. Apr. 21, 2015); *Kelley v. Gordon*, 465 S.W.3d 842, 846 (Ark. 2015) (holding that *Miller* applies retroactively to JLWOP defendants); *Falcon v. State*, 162 So. 3d 954, 955–56 (Fla. 2015) (same); *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014) (same), *cert. denied*, 135 S. Ct. 710 (2014); *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013) (same); *Diatchenko I*, 1 N.E.3d 270, 276 (Mass. 2013) (same); *Jones v. State*, 122 So. 3d 698, 703 (Miss. 2013) (en banc) (same); *State v. Mantich*, 842 N.W.2d 716, 719 (Neb. 2014) (same), *cert. denied*, 135 S. Ct. 67–68 (2014); *Aiken v. Byars*, 765 S.E.2d 572, 575 (S.C. 2014) (same), *cert. denied*, 135 S. Ct. 2379 (2015); *Ex parte Maxwell*, 424 S.W.3d 66, 68 (same) (Tex. Crim. App. 2014); *State v. Mares*, 335 P.3d 487, 508 (Wyo. 2014) (same); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013); S.B. 5064, 63d Leg., Reg. Sess. (Wash. 2013). Given the Court's holding in *Montgomery*, namely that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that mandatory life without parole for juvenile homicide offenders violated the Eighth Amendment, applies retroactively, persons subject to such a sentence in every U.S. state are entitled to resentencing proceedings.

213. See, e.g., CAL. PENAL CODE § 1170(d)(2)(A)(i)–(ii) (West 2015) (sentencing review unavailable for those convicted of torture murder or murdering a police officer); H.B. 7035, 2014 Leg., Reg. Sess. (Fla. 2014) (enacting FLA. STAT. ANN. §§ 775.082(1)(b), 921.1401 (West Supp. 2015)) (retroactive review unavailable for those previously convicted of certain felonies).

214. See *Hill*, 2013 WL 364198, at *1–2 (noting that *Miller* must be applied retroactively because to do otherwise would be “an intolerable miscarriage of justice”); see also MICH. COMP. LAWS ANN. § 769.25–25a (West 2014) (outlining

is imposed in these resentencing hearings, the total number of JLWOP sentences being served may become much lower than it currently is.²¹⁵

Preliminary data from Mississippi and Washington suggest that inmates receive a sentence with the possibility of parole in as many as four out of five cases.²¹⁶ California and Florida, with 288 and 227 inmates, respectively, have passed legislation dramatically limiting the availability of JLWOP.²¹⁷ Likewise, Pennsylvania, with 414 current inmates, has eliminated JLWOP for persons sentenced to second-degree murder.²¹⁸

procedures used to resentence individuals whose sentences were determined to be unconstitutional after *Miller*); *infra* Appendix B (reporting that 370 individuals are currently serving JWOP sentences in Michigan).

215. The total sentences are 2295. Excluding the sentences from Arizona (33), Arkansas (57), California (288), Delaware (5), Florida (227), Illinois (93), Iowa (2), Michigan (370), Mississippi (68), Missouri (103), Nebraska (27), New Hampshire (5), South Carolina (37), Tennessee (13), Texas (17), Washington (22), and Wyoming (4), reduces the total to 924.

As noted above, the Federal Bureau of Prisons and the Virginia Department of Corrections did not provide substantive responses to requests for public information. Thus, information about their JLWOP populations is from other sources. See Louis Hansen, *Bill Would Help Va. Juveniles Reduce Life Sentences*, VIRGINIAN-PILOT (Jan. 9, 2014), <http://hamptonroads.com/2014/01/bill-would-help-va-juveniles-reduce-life-sentences> (reporting that Virginia has at least twenty-two persons serving JLWOP sentences); *Federal Stats: Juveniles Serving Life Without Parole Sentences in the Federal System*, THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH (June 2011), <http://fairsentencingofyouth.org/the-issue/federal-stats> (reporting that there are at least thirty-eight individuals serving JLWOP sentences for crimes committed when they were younger than eighteen).

216. MISSISSIPPI MONTHLY ACTIVITIES REPORT, *supra* note 152, at 9 (reporting that of the seventeen JLWOP sentences that have been reevaluated as of May 2015, eight individuals were resentenced to life with parole, two were resentenced to life without parole, and seven were still waiting to be resentenced); Mitch Ryals, *Juvenile Who Killed Elderly Spokane Woman Given New Sentence*, INLANDER (Sept. 24, 2015, 3:37 PM), <http://www.inlander.com/Bloglander/archives/2015/09/24/juvenile-who-killed-elderly-spokane-woman-given-new-sentence> (noting recent resentencing proceedings in Washington resulting in exclusively parole eligible sentences).

217. See *supra* notes 157–59 and accompanying text; *infra* Appendix B. Pennsylvania has not yet ruled on whether its repeal of JLWOP for second-degree murder is retroactive. See PHILLIPS BLACK PROJECT, *supra* note 158, at 77–78 (noting that the Pennsylvania Supreme Court did not find that *Miller* should apply retroactively). Discerning the full extent of the reforms in these three states would require examination of each of the case files of the people subject to JLWOP in those states. In light of the history of JLWOP in those states, this would be a worthwhile undertaking, but is beyond the scope of this Article.

218. See PHILLIPS BLACK PROJECT, *supra* note 158, at 77–78 (noting that the Pennsylvania Supreme Court did not find that *Miller* should apply retroactively); *infra* Appendix B. Discerning the full extent of the reforms in these three states would require examination each of the case files of the people subject to JLWOP in those

Recent changes in eligibility for JLWOP—including state court holdings making those changes retroactive—mean that many of the people currently subject to the sentence may no longer be. Thus, the total number of persons subject to a *valid* sentence of JLWOP may be much lower than Departments of Corrections have reported.

3. *JLWOP sentences are concentrated in a handful of outlier jurisdictions*

Only a handful of jurisdictions are responsible for most JLWOP sentences;²¹⁹ ten counties alone account for nearly thirty-five percent of *all* JLWOP sentences nationwide.²²⁰ Three counties, which represent 4.1% of the U.S. population, are responsible for over twenty percent of all sentences.²²¹ A similar trend holds for sentences overall, sentences in the last decade, and sentences in the last five years.

The following tables detail the individual counties that are the top ten imposers of JLWOP sentences, both overall and over the last decade. The tables include the number of sentences imposed, the population of the county as a percentage of the total U.S. population in 2014, and the percentage of total JLWOP sentences it imposed.

states. In light of the history of JLWOP in those states, this would be a worthwhile undertaking, but is beyond the scope of this Article.

219. See *supra* note 186 and accompanying text (including California, Florida, Louisiana, Michigan, and Pennsylvania).

220. *Infra* Table 2; Appendix C.

221. *Infra* Table 2; Appendix C.

*Table 2: Concentration of Sentences by County, 1953–2015: Top Ten Sentencers*²²²

County, State	Sentences	County Population as Percentage of Total U.S. Population ²²³	Percentage of Total Sentences (n=2295)
Philadelphia, PA	214	0.5%	9%
Wayne, MI	156	0.5%	7%
Los Angeles, CA	112	3.1%	5%
Orleans, LA	72	0.1%	3%
Cook, IL	65	1.6%	3%
Oakland, MI	49	0.3%	2%
St. Louis City, MO	41	0.1%	2%
East Baton Rouge, LA	35	0.1%	2%
Allegheny, PA	34	0.4%	1%
Jefferson, LA	33	0.1%	1%

222. *Infra* Appendix C.

223. *State & County QuickFacts: Allegheny County, Pennsylvania*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/42/42003.html> (last visited Mar. 27, 2016) (indicating 2014 population of 1,231,255); *State & County QuickFacts: Cook County, Illinois*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/17/17031.html> (last visited Mar. 27, 2016) (indicating 2014 population of 5,246,456); *State & County QuickFacts: East Baton Rouge Parish, Louisiana*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/22/22033.html> (last visited Mar. 27, 2016) (indicating 2014 population of 446,042); *State & County QuickFacts: Jefferson Parish, Louisiana*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/22/22051.html> (last visited Mar. 27, 2016) (indicating 2014 population of 435,716); *State & County QuickFacts: Los Angeles County, California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06/06037.html> (last visited Mar. 27, 2016) (indicating 2014 population of 10,116,705); *State & County QuickFacts: Oakland County, Michigan*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/26/26125.html> (last visited Mar. 27, 2016) (indicating 2014 population of 1,237,868); *State & County QuickFacts: Orleans Parish, Louisiana*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/22/22071.html> (last visited Mar. 27, 2016) (indicating 2014 population of 384,320); *State & County QuickFacts: Philadelphia County, Pennsylvania*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/42/42101.html> (last visited Mar. 27, 2016) (indicating 2014 population of 1,560,297); *State & County QuickFacts: St. Louis (City), Missouri*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/2965000.html> (last visited Mar. 27, 2016) (indicating 2014 population of 317,419); *State & County QuickFacts: Wayne County, Michigan*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/26/26163.html> (last visited Mar. 27, 2016) (indicating a 2014 population of 1,764,804); *QuickFacts: United States*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Mar. 27, 2016) (indicating 2014 population of 318,857,056).

A single county, Philadelphia County, Pennsylvania, accounts for nine percent of all JLWOP sentences nationwide. Its proportion of JLWOP sentences is eighteen-fold its proportion of the U.S. population. Three counties account for over twenty percent of all JLWOP sentences. Orleans Parish, Louisiana has a proportion of JLWOP sentences that is thirty-one fold its proportion of the U.S. population. With the exception of Los Angeles County, California, each of the counties among the top ten sentencers is responsible for JLWOP sentences far out of proportion to its population. Thus, Los Angeles’s inclusion as a top sentencer can, in part, be explained by its large population. The same is not true for the other counties in this list. Sentences in the last decade have followed similar trends.

Table 3: Concentration of Sentences by County, 2006–2015: Top Nine Sentencers²²⁴

County, State	Sentences	County Population as Percentage of Total U.S. Population ²²⁵	Percentage of Total 2006–2015 (n=504)
Los Angeles, CA	29	3.1%	7%
Wayne, MI	22	0.6%	4%
Philadelphia, PA	18	0.5%	4%
Miami-Dade, FL	13	0.8%	3%
Sacramento, CA	12	0.5%	2%
Orleans, LA	11	0.1%	2%
Harris, TX	11	1.4%	2%
Allegheny, PA	10	0.4%	2%
Oakland, MI	9	0.4%	2%

224. This information comes from responses to the authors’ FOIA requests and is on file with the authors. See *infra* Appendix A (detailing the results of authors’ FOIA requests and the limitations of the authors’ data collection). Hillsborough and Palm Beach Counties in Florida, along with San Diego County in California, each have eight JLWOP sentences.

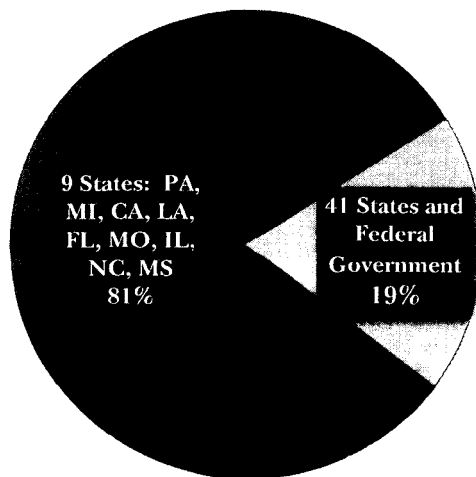
225. *State & County QuickFacts: Harris County, Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/48201.html> (last visited Mar. 27, 2016) (indicating a 2014 population of 4,441,370); *State & County QuickFacts: Miami-Dade County, Florida*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/12/12086.html> (last visited Mar. 27, 2016) (indicating a 2014 population of 2,662,874); *State & County QuickFacts: Sacramento County, California*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/06067> (l last visited Mar. 27, 2016) (indicating a 2014 population of 1,482,026); *supra* note 223 (providing U.S. Census data for Los Angeles, California; Wayne, Michigan; Philadelphia, Pennsylvania; Orleans, Louisiana; Allegheny, Pennsylvania; and Oakland, Michigan).

Remarkably, many of the overall high sentencers are also among those imposing a high number of sentences in the last ten years. Although East Baton Rouge and Jefferson Parishes in Louisiana are not included in the top ten sentencers in the last decade,²²⁶ each of those jurisdictions has imposed seven JLWOP sentences. Five counties and one parish are in the top ten on both lists: Philadelphia County, Pennsylvania; Wayne County, Michigan; Los Angeles County, California; Orleans Parish, Louisiana; Oakland County, Michigan; and Allegheny County, Pennsylvania.

This handful of jurisdictions is responsible for a large portion of JLWOP sentences, both historically and in the last decade. Moreover, like the overall sentencing trend, JLWOP sentencing in the last ten years has, with the exception of Los Angeles County, been largely disproportionate to the population of those jurisdictions.

As with counties, JLWOP sentences are concentrated in a small handful of states: only nine states account for over four-fifths of JLWOP sentences.²²⁷

Figure 9: JLWOP Use by State²²⁸



226. *Infra* Appendix C.

227. JOHN R. MILLS ET AL., PHILLIPS BLACK PROJECT, NO HOPE: RE-EXAMINING LIFETIME SENTENCES FOR JUVENILE OFFENDERS 2 (2015), <http://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/5600cc20e4b0f36b5caabe8a/1442892832535/JLWO P+2.pdf>; *infra* Appendix B.

228. *Infra* Appendix B.

California and Florida recently limited the availability of JLWOP sentences, and Pennsylvania and North Carolina have eliminated it for second-degree murder and felony murder, respectively.²²⁹ In light of the significant role that these states play in JLWOP, both historically and in recent years, these changes could have a profound impact on JLWOP sentences going forward.

Both overall and in recent years, states have limited their use of JLWOP in practice, even if the sentence is statutorily available.²³⁰ In addition to the jurisdictions that have abolished JLWOP, Indiana, Maine, New Jersey, New Mexico, New York, and Rhode Island currently have no one serving a JLWOP sentence.²³¹ An additional four states have five or fewer persons serving a JLWOP sentence from any period,²³² and, in addition to those, five states have one or no persons serving a JLWOP sentence imposed in the last five years.²³³ At the state level, the use of JLWOP is increasingly isolated.

4. *African American juveniles are disproportionately sentenced to JLWOP*

The majority of JLWOP sentences are imposed on African American juveniles. There are more than double the number of African American juveniles serving JLWOP compared to white juveniles; 1303 of the juveniles serving JLWOP are African American, compared to 531 juveniles who are white.

229. See *supra* notes 154–62 and accompanying text.

230. See *supra* notes 110–13 and accompanying text (noting that JLWOP sentences have been limited by a variety of state changes in the law).

231. E-mail from Christine M. Blessinger, Ind. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (May 21, 2015, 05:08 AM) (on file with authors); E-mail from Scott Fish, Dir. of Special Projects, Me. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (May 28, 2015, 06:19 AM) (on file with authors); E-mail from Catherine Earl, Office of Gen. Counsel, N.M. Corr. Dep't, to Anna Dorn, Research Fellow, Phillips Black Project (May 22, 2015, 01:15 PM) (on file with authors); E-mail from Kathleen Kelly, Chief Legal Counsel, R.I. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Sept. 29, 2015, 2:51 PM) (on file with authors); see AMNESTY INT'L & HUMAN RIGHTS WATCH, *supra* note 1, at 2 (noting that no inmates were serving JLWOP sentences in New Jersey as of 2005); THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE, *supra* note 104, at 2 (suggesting that New York does not currently have any juveniles serving JLWOP).

232. Idaho (4), Ohio (5), New Hampshire (5), North Dakota (1). See *infra* Appendix B.

233. Alabama (0), Arkansas (1), Iowa (1), Maryland (1), Minnesota (0). See *infra* Appendix B.

Table 4: Race of Juveniles Serving JLWOP²³⁴

Race	n (n=1981)	%
African American	1303	65.8%
White	531	26.8%
Hispanic	120	6%
Asian	17	1%
American Indian	10	1%

One possible explanation for the race differences in JLWOP sentences is that the arrest rates are also different. If African American juveniles are arrested in similar proportions to JLWOP sentences, the racial disparity may be attributable to policing policies, rather than sentencing. To examine whether the racial disparity in JLWOP sentences can be explained by differences in arrest rates, we compared our JLWOP dataset with the SHR from 1980 to 2013.²³⁵ The SHR contains information on the majority of murders committed in the United States and is regarded as among the most reliable crime data.²³⁶

Of the individuals who have been arrested for murder and non-negligent manslaughter between 1980 and 2013, fifty-six percent were African American and forty-one percent were white.²³⁷ Therefore, JLWOP sentences are imposed upon African American juveniles in disproportion to their homicide arrest rate: African American juveniles make up fifty-six percent of the individuals arrested for murder and non-negligent homicide and sixty-six percent of the individuals sentenced to JLWOP.²³⁸

234. *Infra* Appendix B. We were missing race data from 318 individuals in our dataset. This includes all of the individuals serving JLWOP sentences in California (n=288) and Minnesota (n=7).

235. *Supplementary Homicide Reports*, *supra* note 108.

236. Valerie P. Hans et al., *The Death Penalty: Should the Judge or the Jury Decide Who Dies?*, 12 J. EMPIRICAL LEGAL STUD. 70, 84–85 (2015).

237. *Supplementary Homicide Reports*, *supra* note 108.

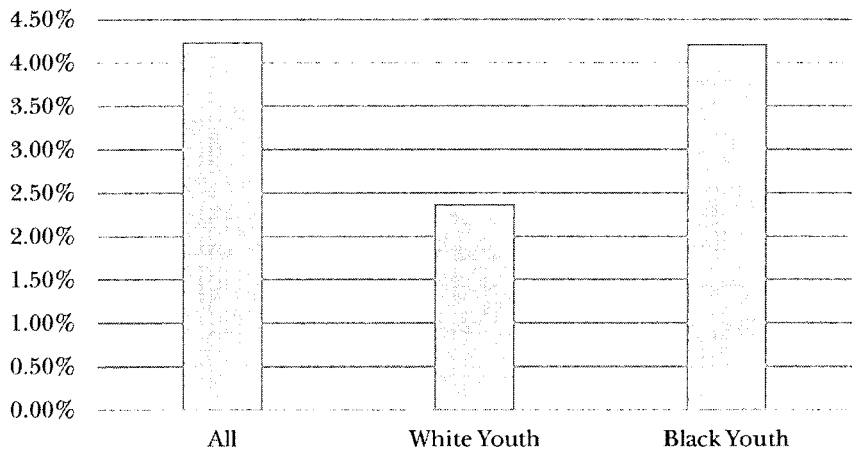
238. See *infra* Figure 11 (showing that arrest rates between African Americans and whites have been relatively similar over the same time period).

Table 5: Race of Juveniles Arrested for Murder and Non-negligent Homicide, 1980-2013²³⁹

Race	n (n=48,188)	% of those arrested
African American	27,109	56%
White	19,779	41%
Asian	877	2%
American Indian	423	1%

Next we used SHR data to calculate the portion of JLWOP sentences per reported homicide for white and African American juveniles.²⁴⁰ By comparing the proportion of JLWOP sentences per reported homicides, we are able to control for the overall number of homicide arrests within each racial group.

Figure 10: JLWOP Sentences Per Homicide Arrest²⁴¹



239. *Supplementary Homicide Reports*, *supra* note 108. The SHR does not record Hispanic Ethnicity. *Id.*

240. We did not calculate sentencing rates for Hispanic juveniles because the SHR does not record Hispanic Ethnicity. In addition, we do not report the sentencing rates for Asian and Native American juveniles because few Asian and Native American youths are arrested and at most one or two Asian and Native American youth are sentenced to JLWOP a year.

241. These rates were calculated by comparing the authors’ JLWOP sentencing data to arrest rates from the SHR. See *Supplementary Homicide Reports*, *supra* note 108; *infra* Appendix B (reporting the number of JLWOP sentences being served in each state); see also *infra* Appendix A (detailing the results of authors’ FOIA requests and the limitations of the authors’ data collection).

The results confirm that African American juveniles are disproportionately sentenced to JLWOP compared to white juveniles. While five percent of African American juveniles arrested for murder are sentenced to JLWOP, only three percent of white juveniles are similarly sentenced.²⁴² The disparate impact described here accounts for the varied arrest rates between African Americans and whites. That is, the disparity is not because one group is more often arrested for homicide than the other is—the disparity necessarily arises at some point after the arrest.

The disparity in JLWOP sentencing has been present since 1980, the first year of our SHR data, but it increased after 1992.²⁴³ A chi-square test of independence revealed that this effect is statistically significant.²⁴⁴ The chi-square statistic tests whether the number of life sentences varies significantly across the race of the youth and the period during which he or she was sentenced.²⁴⁵ The association here means that it is unlikely that the results were the product of chance and did not involve a relationship between race and time of sentencing.²⁴⁶ Since 1992, the portion of African American juveniles sentenced to JLWOP has increased.

The disparity reported here is attributable only to events occurring after arrest. This leaves only charging discretion, conviction rates, and sentencing discretion. The latter was largely only present after *Miller*.²⁴⁷ Thus, the disparity is likely attributable to either a higher conviction rate for non-whites or to racially disparate charging practices.

242. *Supra* Figure 10. These rates were calculated by comparing the authors' JLWOP sentencing data to arrest rates from the SHR. *Supplementary Homicide Reports*, *supra* note 108.

243. *Supplementary Homicide Reports*, *supra* note 108.

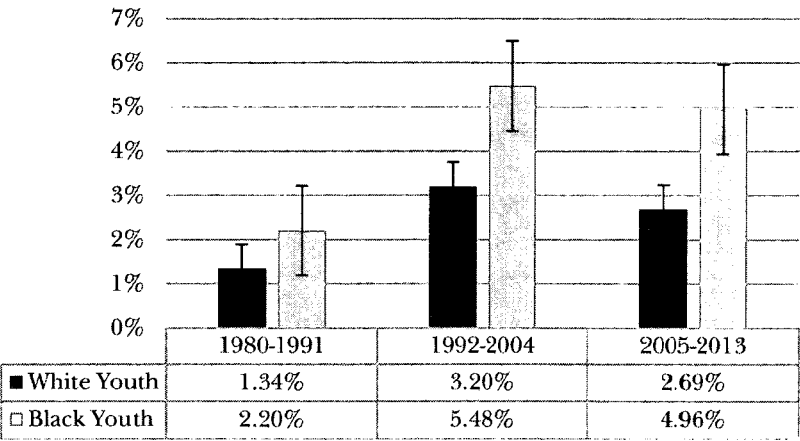
244. Chi-square is a common statistical test used frequently in the social sciences. See, e.g., Stephanie Hindson et al., *Race, Gender, Region and Death Sentencing in Colorado, 1980–1999*, 77 U. COLO. L. REV. 549, 579 (2006) (employing chi-square analysis).

245. $\chi^2(2, N = 758) = 9.35, p < .05$.

246. “A p-value is a measure of how likely it is that one would obtain results at least as skewed as those shown even if the differences were, in fact, simply random variation. A p-value of 0.05 or less is generally considered to be statistically significant and evidence of a relationship between the two variables at issue.” Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 330 n.98 (2009).

247. See generally PHILLIPS BLACK PROJECT, *supra* note 158, at 2–3 (outlining JLWOP eligibility in each U.S. jurisdiction before and after *Miller v. Alabama*).

Figure 11: Rates of JLWOP Sentences per Juvenile Arrested for Homicide Based on Race of Juvenile²⁴⁸



Qualitatively, it is difficult to explain the racial disparities of JLWOP sentences in race-neutral terms, particularly for some jurisdictions. For example, Texas has had no whites and only has non-whites serving JLWOP sentences.²⁴⁹ The U.S. Census reports that, in 2014, Texas’s population was 43.5% white, non-Hispanic.²⁵⁰

Other states also have highly disparate rates of imposing JLWOP sentences on non-whites, including Illinois (81.7% of the JLWOP population; 37.7% of the total population), Louisiana (81% of the JLWOP population; 40.7% of the total population), Mississippi (69.1% of the JLWOP population; 42.7% of the total population), North Carolina (88.5% of the JLWOP population; 35.9% of the total population), Pennsylvania (79.5% of the JLWOP population; 22.1% of the total population), and South Carolina (70.3% of the JLWOP population; 36.1% of the total population).²⁵¹ Non-whites are

248. *Infra* Appendix B. The standard error represents the amount of variation in the sample. For each year, the majority of the arrest rates will fall within the error bars. Because the error bars do not overlap for white and black youth from 1992–2004 and 2005–2013, these groups are likely to be significantly different.

249. *Infra* Appendix B. Before abolishing JLWOP, Texas imposed it on seventeen people: thirteen are black and four are Hispanic.

250. *State & County Quick Facts: Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Mar. 27, 2016).

251. *State & County Quick Facts: Illinois*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/17000.html> (last visited Mar. 27, 2016); *State & County Quick Facts: Louisiana*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/22000.html> (last visited Mar. 27, 2016); *State & County Quick Facts: Mississippi*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/>

overrepresented among the JLWOP population in ways perhaps unseen in any other aspect of our criminal justice system. This kind of disparity harkens back to the inequitable sentencing practices that developed during the Jim Crow Era.²⁵²

These findings are especially remarkable and alarming because prior research suggests that rate of arrest is a larger source of racial disparity in the administration of juvenile justice.²⁵³ Moreover, similar studies of the death penalty most often find racial disparities based on the race of the victim, or the interplay between the race of the defendant and victim.²⁵⁴ Here, we find significantly different sentencing practices for African American and white youth without taking into account the race of the victims. Based on the experience with the death penalty, we would expect an even greater disparity between African American youth accused of killing white victims and white youth accused of killing African American victims.

A complete accounting of the race of defendants as well as an examination of additional variables, such as the race of the victim and the aggravating circumstances present in each case, would uncover the defendants most at risk for a JLWOP sentence. However, these

qfd/states/28000.html (last visited Mar. 27, 2016); *State & County Quick Facts: North Carolina*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/37000.html> (last visited Mar. 27, 2016); *State & County Quick Facts: Pennsylvania*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/42000.html> (last visited Mar. 27, 2016); *State & County Quick Facts: South Carolina*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/45000.html> (last visited Mar. 27, 2016); *infra* Appendix B. Percentages were rounded to the nearest tenth.

252. See Marvin E. Wolfgang, *The Social Scientist in Court*, 65 J. OF CRIM. L. & CRIMINOLOGY 239, 242 (1974) (studying application of capital rape statutes for convictions in eleven southern states from 1945 to 1965, and finding that black defendants with white victims were sentenced to death eighteen times more frequently than any other combination).

253. See HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 188 (2006), <http://ojjdp.gov/ojstatbb/nr2006/downloads/nr2006.pdf> (finding that racial disparity is most pronounced at the arrest stage of the juvenile justice system).

254. See, e.g., DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL EMPIRICAL ANALYSIS 140–41 (1990) (finding that the race of the victim effects Georgia's administration of the death penalty); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 55 (1984) (finding similar results across jurisdictions); Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1939–40 (2012) (finding dramatically higher death sentencing rate where the victim is white and the defendant is African American).

nuances would not undermine the principal finding here: there is a significant racial disparity in JLWOP sentencing.²⁵⁵

III. THE MYTH OF THE SUPERPREDATOR AND THE RISE OF JLWOP SENTENCES

In the 1990s, the same period which saw a dramatic upswing in JLWOP sentences and significant changes to policies permitting those sentences, some political scientists were promoting the idea that a group of youth, unhinged from moral restraints, would endanger the safety and well-being of everyone in their paths. They coined the term “superpredator” to describe the group of juveniles who would commit atrocious, violent acts for seemingly insignificant reasons.²⁵⁶ At the same time, legislatures in forty-five states passed laws that expanded the application of adult sentences to persons less than eighteen years old. Although there was a short-lived upswing in violent crimes—committed by both adults and juveniles—there is little empirical evidence for what has now been recognized as the superpredator myth. In light of the significant changes in policy and sentencing, we have described this period as the Superpredator Era.

The racial undertones, now widely acknowledged to undergird the superpredator myth, may explain the disparities in JLWOP sentencing beginning around the same time that the superpredator myth gained national prominence. Whether the sentencing outcomes are a product of the myth or whether both are the product of a larger phenomenon is, in some ways, beside the point. Both point to a larger problem regarding how the state administers its harshest penalties. Race plays a significant role when the only appropriate question should be whether “the juvenile offender will forever be a danger to society . . . [such that the] sentence . . . make[s] the] judgment that the juvenile is incorrigible.”²⁵⁷

The following discussion of the superpredator myth is intended to provide one possible explanation for the dramatic shift in policies and sentencing outcomes that took place in this era. We do not, and could not, conclusively identify the myth as the source of the disparity. However, its prominence and influence during the same period that saw a rise in both total JLWOP sentences imposed and in

255. See *supra* Section II.C.4.

256. See John Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), <http://www.weeklystandard.com/article/8160>.

257. *Graham v. Florida*, 130 S. Ct. 2011, 2029 (2010).

the disparity of imposition suggest a discussion of the superpredator myth is warranted.

A. Creation of the Myth

Twenty years ago, Princeton academic John Dilulio coined the term “superpredator” to refer to an impending wave of dangerous juvenile offenders.²⁵⁸ Specifically, he predicted “tens of thousands of severely morally impoverished juvenile[s]” who “fear[ed] neither the stigma of arrest nor the pain of imprisonment” and who were “capable of committing the most heinous acts of physical violence for the most trivial reasons.”²⁵⁹ A number of influential criminologists at the time adopted Professor Dilulio’s theory and rhetoric, anticipating an upcoming surge of “radically impulsive, brutally remorseless” juveniles, armed with guns and having “absolutely no respect for human life.”²⁶⁰ Criminologist James Fox publicly admonished: “Unless we act today, we’re going to have a bloodbath when these kids grow up.”²⁶¹

Throughout the 1990s, the superpredator myth captured popular and political imaginations. In 1996, Newsweek published an article warning of a “generation of teens so numerous and savage that [they will] take violence to a new level.”²⁶² Former Florida congressman Bill McCollum warned subcommittee members to “brace themselves for the coming generation of super-predators.”²⁶³ In a speech before the International Association of Chiefs of Police, President Bill Clinton warned about dangerous children whose “hearts can be turned to stone by the time they’re [ten] or [eleven] years old.”²⁶⁴

258. See Dilulio, *supra* note 256 (exploring factors that push youth to become “super crime-prone young males”).

259. *Id.*

260. See *The Superpredator Myth, 20 Years Later*, *supra* note 100 (tracing the rise and fall of the Superpredator Era).

261. *Id.*

262. *Superpredators Arrive*, NEWSWEEK (Jan. 21, 1996, 7:00 PM), <http://www.newsweek.com/superpredators-arrive-176848>.

263. *Hearings on the Juvenile Justice and Delinquency Prevention Act: Hearings Before the Subcomm. on Early Childhood, Youth and Families of the H. Comm. on Econ. and Educ. Opportunities*, 104th Cong. 90 (1996) (statement of Rep. Bill McCollum, Chairman, Subcomm. on Crime, H. Comm. on the Judiciary).

264. *Clinton Cites Need for Role Models*, CHI. SUN-TIMES, Oct. 18, 1994, at 3, 1994 WLNR 5440091.

The language invoked to describe the “superpredator” evoked race-based sentiments without explicitly mentioning race.²⁶⁵ There was, however, “little difference between the description of mainly inner city African-American youth as ‘superpredators’ and the historic representations of African-Americans as violence-prone, criminal, and savage.”²⁶⁶ Media reports during this time depicted these “teen killers” and “young thugs” primarily as children of color.²⁶⁷ A 1999 study based on nineteen local news programs across the country found that non-white youth appeared in crime news significantly more often than white youth (fifty-two percent versus thirty-five percent).²⁶⁸ Likewise, a 2000 study of national news accounts found that sixty-two percent of stories about Latino youth were about homicide, despite youth of color accounting for less than fifty percent of all violent juvenile crime arrests around this time.²⁶⁹ The media also exaggerated the connection between race and dangerous crime.²⁷⁰ A 1996 study found that Los Angeles media outlets were twenty-two percent more likely to depict African American offenders committing violent crime than nonviolent crime, while in reality they were equally likely to be arrested for both.²⁷¹ On the other hand, white offenders were thirty-one percent more likely to be shown committing a nonviolent crime, when in reality they were only seven percent more likely to be arrested for a nonviolent crime.²⁷² News reports similarly exaggerated interracial crime. Between 1990 and 1994, interracial homicides were twenty-five percent more likely to be reported by the Los Angeles Times than intra-racial homicides.²⁷³ Ultimately, in the public consciousness, “superpredator” became a “code word for young Black males.”²⁷⁴

265. Jane Rutherford, *Juvenile Justice Caught Between The Exorcist and A Clockwork Orange*, 51 DEPAUL L. REV. 715, 720–21 (2002) (explaining that terms like superpredator “carry silent, racially charged messages”).

266. Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 712 (2002).

267. Robert E. Shepherd, Jr., *How the Media Misrepresents Juvenile Policies*, 12 CRIM. JUST. 37, 38 (1998).

268. LORI DORFMAN & VINCENT SCHIRALDI, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 21 (2001), <http://cclp.org/documents/BBY/offbalance.pdf>.

269. Vincent M. Southerland, *Youth Matters: The Need to Treat Children Like Children*, 27 J. CIV. RTS. & ECON. DEV. 765, 771 (2015).

270. DORFMAN & SCHIRALDI, *supra* note 268, at 4–5.

271. *Id.* at 15.

272. *Id.*

273. *Id.* at 16.

274. Nunn, *supra* note 266, at 712.

The racial underpinnings of the defining myth for the Superpredator Era extended beyond the depictions promoting it and reached the core assumptions underlying it as a social theory. In 1992, psychiatrist Dr. Frederick Goodwin organized an initiative to study inner-city violence.²⁷⁵ In choosing to focus on the inner city, Dr. Goodwin explained, “maybe it isn’t just careless use of the word when people call certain areas of certain cities jungles,”²⁷⁶ making references to hyper-aggressive male monkeys.²⁷⁷ Professor Dilulio also played a major role in implanting race-based assumptions into the superpredator narrative. In his 1995 *Weekly Standard* article, he wrote that the “surge in violent youth crime has been most acute among black inner-city males.”²⁷⁸ In 1996, he wrote an article entitled *My Black Crime Problem, and Ours*, in which he described the increasing “black crime rate, both black-on-black and black-on-white,” and predicted that “as many as half of these juvenile super-predators could be young black males.”²⁷⁹ Similarly, a 1996 report of the Dean of Northeastern University’s College of Criminal Justice predicted that “the next wave of youth crime” would be attributed to an increase in the population of African American males.²⁸⁰ Thus, racialized media accounts and the academic underpinnings of the coverage played a role in defining the Superpredator Era and its resulting policies.

B. Resulting Policies

Media coverage of violent crimes by juveniles coupled with ominous predictions might have led state legislatures during this era to expand harsh sentencing options for juveniles.²⁸¹ One commentator wrote: “Racial imagery and racially biased political appeals played an important role in creating the climate that led to the enactment of this legislation.”²⁸² From 1992 to 1999, forty-nine states

275. Rutherford, *supra* note 265, at 723.

276. *Id.*

277. *Id.*

278. Dilulio, *supra* note 258.

279. John J. Dilulio, Jr., *My Black Crime Problem, and Ours*, CITY J. (1996), <http://www.city-journal.org/html/my-black-crime-problem-and-ours-11773.html>.

280. JAMES ALAN FOX, U.S. DEP’T OF JUSTICE, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING 3 (1996).

281. *The Superpredator Myth, 20 Years Later*, *supra* note 100.

282. Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 514 (2009).

and the District of Columbia amended their transfer statutes to make it easier for juveniles to be tried in adult court and face adult sentences.²⁸³

These states enacted changes such as lowering the minimum age of transfer, expanding the catalogue of offenses that allowed for or required transfer, and shifting discretion from judges to prosecutors in charging decisions.²⁸⁴ By 1999, more than half of the states had mandatory transfer provisions for certain offenses, often removing all judicial discretion from the process.²⁸⁵ In some states, transfer statutes were amended to reach children as young as ten.²⁸⁶ By 1997, seventeen states had amended their juvenile sentencing statute's purpose clauses to stress the objectives of public safety and offender accountability, as opposed to the previous goal of rehabilitating delinquent youth.²⁸⁷ Following these statutory changes, increasing numbers of juveniles were prosecuted in the adult system, with expanded vulnerability to JLWOP sentences.

C. Only a Myth

The predicted surge of juvenile crime never occurred. By 2000, the juvenile homicide rate had stabilized below its 1985 level, as confirmed by the very criminologists who predicted the crime wave.²⁸⁸

Recently, in a complete about-face, Dilulio and Fox were among a group of criminologists who submitted an amicus brief in support of the petitioners in *Miller*, arguing that mandatory JLWOP violated the Eighth Amendment.²⁸⁹ The brief detailed comprehensive research demonstrating that predictions regarding the superpredator were wrong and admitted that the myth created "an ill-suited and excessive punishment regime."²⁹⁰ Thus, the remaining unchanged

283. SHORT & SHARP, *supra* note 170, at 7.

284. PATRICK GRIFFIN ET AL., NAT'L CENTER FOR JUVENILE JUSTICE, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 14–15 (1998), <https://www.ncjrs.gov/pdffiles/172836.pdf>; Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J. L. ETHICS & PUB. POL'Y 9, 12–13 (2008).

285. Feld, *supra* note 284, at 13.

286. *Id.*

287. PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996–97 UPDATE 6–9 (1998), <https://www.ncjrs.gov/pdffiles/172835.pdf>.

288. *The Superpredator Myth, 20 Years Later*, *supra* note 100.

289. *Id.*

290. Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners at 37, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9647, 10-9646).

Superpredator Era statutes, including those expanding the availability of JLWOP, may be described as vestiges of debunked social theories.

To be sure, the superpredator myth does not tell the whole story. The surge in JLWOP sentences, in some places, predates Dilulio and Fox's first articles on the superpredator myth. However, their now discredited theory was part of an era of expanded treatment of youth as adults and increased JLWOP sentences. It thus may provide an important piece of the puzzle in explaining both the sharp rise in JLWOP sentences and its racialized application.

CONCLUSION

An examination of juvenile life without parole, both in law and in practice, raises substantial questions about its wisdom and constitutionality. The stark racial disparities raise particularly troubling questions about its ongoing legitimacy. African American juvenile offenders are sentenced to JLWOP at almost twice the rate of white juvenile offenders per homicide arrest.²⁹¹ For juveniles sentenced to mandatory JLWOP sentences, this means that the only source of the disparity is in the prosecutor's charging decision and in the jury's guilt determination. In discretionary JLWOP regimes, the source of disparity is with the prosecutor, the jury, or the sentencer.²⁹²

An examination of the cause of racial disparities in sentencing is beyond the scope of this Article. Future research should examine the JLWOP cases more closely to determine whether charging, conviction, and/or sentencing decisions are being made, consciously or unconsciously, based on race.²⁹³ If those decisions are conscious, those serving JLWOP sentences pursuant to those decisions should be entitled to relief from their sentences.²⁹⁴ Even if the decisions are

291. See *supra* Section II.C.4.

292. See *supra* Section III.B.

293. See *supra* Section II.A.

294. See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (explaining that to establish an equal protection violation, criminal defendants must show "the decisionmakers [sic] in *his* case acted with discriminatory purpose"); see also *United States v. Armstrong*, 517 U.S. 456, 458 (1996) (holding that a defendant must produce credible evidence that similarly situated individuals of different races could have been prosecuted but were not in order to establish entitlement to discovery in selective prosecution cases based on race); Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 529 (1995) (noting that proving discriminatory impact would be very difficult because "racism is often unconscious, or usually, at the least, not openly expressed, [and] such proof will rarely be available"). See generally Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV.

unconscious and do not rise to the level of a constitutional violation, they are plainly bad policy. Either source of disparity raises questions about our criminal justice system's ability to fairly and rationally mete out its harshest punishments on juveniles, some of the most vulnerable people it is responsible for sentencing.

States, however, are abandoning those policies. Only three counties, which account for approximately four and one-tenth percent of the total population, are responsible for over one-fifth of all sentences nationwide.²⁹⁵ In the last decade, that trend has continued, as six counties account for one-fifth of all JLWOP sentences in that timeframe.²⁹⁶ On a state level, nine jurisdictions account for over four-fifths of all JLWOP sentences.²⁹⁷

The states and counties that have been the most frequent users of JLWOP have recently adopted substantial limitations to their JLWOP policies.²⁹⁸ The rate, direction, and consistency of the change in JLWOP statutes, together with its waning use, where still available, indicate our nation's evolving standards of decency regarding JLWOP sentences and could result in its prohibition under the Constitution.²⁹⁹ The policy's potential relationship to the superpredator myth and its implementation now require rigorous examination to determine whether it possesses any legitimate penological justification.

13, 18 (1998) (examining the increasing difficulty in challenging discretionary decisions that have a discriminatory effect and proposing the use of racial impact studies to address the issue).

295. See *supra* Section II.C.3.

296. See *supra* Section II.C.3.

297. See *supra* Section II.C.3.

298. See *supra* notes 151–59 and accompanying text.

299. See *supra* Section I.A (summarizing the evolving standards of decency); *supra* Part II (discussing how states are moving away from imposing JLWOP sentences).

APPENDIX A

ALABAMA

The Alabama Department of Corrections provided a complete list of all nineteen persons serving JLWOP sentences that was current as of June 29, 2015. Alabama provided an updated list on August 13, 2015, after its original list erroneously included individuals who had entered the penal system prior to age eighteen, but whose JLWOP offenses occurred after the age of eighteen.

Because the Alabama Department of Corrections tracks only the admission date and not offense or sentencing dates, the reported number is approximate. The Alabama numbers do not capture inmates sentenced to JLWOP who were under eighteen at the time of the offense, but who were not admitted to the prison system until after age eighteen. They likely underreport the number of total JLWOP sentences. In particular, they likely underreport the total number of JLWOP sentences for offenses committed at age seventeen, as these are the sentences most likely to be imposed after age eighteen.

The offense dates were provided not by the Alabama Department of Corrections, but from other sources: namely, case law and news articles regarding the offenses.

ALASKA

The Alaska Department of Corrections has confirmed that there are zero persons serving a JLWOP sentence, current as of May 26, 2015. Alaska has never authorized JLWOP.

ARIZONA

The Arizona Department of Corrections provided a complete list of all thirty-three persons serving JLWOP sentences that was current as of June 29, 2015. The number of persons serving a JLWOP sentence in Arizona will likely decrease, as in 2014 an Arizona appellate court interpreted Arizona's statutory *Miller* fix as applying retroactively, giving all persons subject to JLWOP in Arizona an opportunity to seek resentencing.³⁰⁰

300. See *State v. Randles*, 334 P.3d 730, 733 (Ariz. Ct. App. 2014), *cert. denied*, No. CR-14-0306-PR, 2015 Ariz. LEXIS 126 (Ariz. Apr. 21, 2015); H.B. 2593, 51 Leg., 2d Reg. Sess. (Ariz. 2014).

ARKANSAS

The Arkansas Department of Corrections provided a complete list of all fifty-seven persons serving JLWOP sentences that was current as of May 20, 2015.

The number of persons serving a JLWOP sentence in Arkansas will likely decrease because, in 2015, the Arkansas Supreme Court held that *Miller* applies retroactively on collateral review, giving all persons subject to JLWOP in Arkansas an opportunity to seek resentencing.³⁰¹

CALIFORNIA

The California Department of Corrections provided a complete list of all 288 persons serving JLWOP sentences that was current as of July 8, 2015.

The number of persons serving a JLWOP sentence in California will likely dramatically decrease because, since *Miller*, California has passed two juvenile sentencing bills that effectively reduce the “aggravating circumstances” making a person eligible for JLWOP from twenty-two to two. The law applies retroactively, likely making most persons currently serving JLWOP no longer eligible for the sentence. Finally, the law provides for improved parole review, making the opportunity for release more meaningful once resentenced.³⁰²

The sentence dates were not provided by the California Department of Corrections, but were collected from other sources: namely, case law, the California Court of Appeals website, and news articles regarding the offenses. Where a sentence date could not be located, date of appellate filing is listed a close approximation, as appeals must be filed within sixty days of the date of the judgment or order for felony cases.³⁰³

The California Department of Corrections did not provide race or gender, pointing to title 15, section 3261.2 of the California Code of Regulations, which does not include race and gender as types of personal information that the Department is authorized to release.³⁰⁴

COLORADO

The Colorado Department of Corrections provided a complete list of the fifty-six persons serving JLWOP sentences that was current as of

301. See *Kelley v. Gordon*, 465 S.W.3d 842, 842–43 (Ark. 2015).

302. See S.B. 9, 2011–12 Reg. Sess. (Cal. 2012) (amending CAL. PENAL CODE § 1170 (West 2014)); S.B. 260, 2013–14 Reg. Sess. (Cal. 2013) (amending CAL. PEN. CODE §§ 3041, 3046, 4801 and enacting § 3051).

303. See CAL. R. OF CT. § 8.308.

304. CAL. CODE. REGS. tit. 15, § 3261.2 (2016).

May 20, 2015. Duplicate names represent multiple JLWOP sentences imposed. Colorado no longer authorizes JLWOP. Colorado abolished JLWOP in 2006.³⁰⁵

CONNECTICUT

The Connecticut Department of Corrections provided a complete list of all four persons serving JLWOP sentences that was current as of May 20, 2015.

The number of persons serving a JLWOP sentence provided by the Connecticut Department of Corrections is outdated and should be zero. The number should be zero because a 2015 state bill retroactively outlawed JLWOP, eliminating all JLWOP sentences in Connecticut.³⁰⁶

DELAWARE

The Delaware Department of Corrections provided complete information on the five persons serving JLWOP sentences that was current as of June 20, 2015. The Department indicated that four of these five individuals are currently in the process of being resentenced pursuant to recent legislation.³⁰⁷

The number of persons serving a JLWOP sentence provided by the Delaware Department of Corrections is misrepresentative of the actual sentences that will be served. Delaware's 2013 juvenile sentencing bill provides an opportunity for sentencing review in every JLWOP case, effectively eliminating JLWOP, and specifies that it applies retroactively.³⁰⁸ Therefore, the number of JLWOP sentences in Delaware, in practice, is zero.

The offense dates were provided not by the Delaware Department of Corrections, but from other sources: namely, case law and news articles regarding the offenses.

305. COLO. REV. STAT. § 18-1.3-401(4)(b)(I) (2006) (amending § 18-1.3-401(4) (2002)).

306. See S.B. 796, Jan. Sess. (Conn. 2015) (amending CONN. GEN. STAT. § 54-125a (West, Westlaw through 2015 Reg. Sess.)); see also *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1033 (Conn. 2015) (holding that *Miller* applies retroactively on collateral review).

307. See DEL. CODE ANN. tit. 11, § 4204A(d) (West, Westlaw through 80 Del. Laws, ch. 194).

308. See S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (amending DEL. CODE ANN. tit. 11, §§ 4209, 4209-A, 4209-217(f), 3901(d)).

DISTRICT OF COLUMBIA

The District of Columbia Department of Corrections has not yet responded to our request for public information. Reports suggest, however, that the District has zero JLWOP prisoners.³⁰⁹

FEDERAL GOVERNMENT

The Federal Bureau of Prisons has declined to provide information in response to our Freedom of Information Act request. The United States' brief in *Montgomery*, however, suggests that there are twenty-seven inmates serving federal JLWOP sentences.³¹⁰

FLORIDA

The Florida Department of Corrections provided an active inmate database that was current as of July 29, 2015. We then isolated individuals serving JLWOP sentences based on our own internal calculations, which totaled at 227.

The number of persons serving a JLWOP sentence will likely decrease because a recent Florida Supreme Court decision holds that resentencing in accordance with Florida's amended post-*Miller* statutes should be available to "all juvenile offenders whose sentences are unconstitutional under *Miller*"³¹¹ That statute no longer makes JLWOP mandatory.

In the three cases for which the Florida Department of Corrections did not provide an offense date, it was acquired through other sources: namely, case law and news articles regarding the offenses.

GEORGIA

The Georgia Department of Corrections provided a complete list of all twenty-five persons serving JLWOP sentences that was current as of May 27, 2015. Georgia provided an updated list on August 11, 2015, after its original list erroneously included individuals who had entered the penal system prior to age eighteen, but whose JLWOP offenses occurred after the age of eighteen.

309. See, e.g., THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE, *supra* note 104, at 2.

310. Brief for the United States as Amicus Curiae Supporting Petitioner at 1, *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015) (No. 14-280).

311. *Falcon v. State*, 162 So. 3d 954, 963 (Fla. 2015); see H.B. 7035, 2014 Leg., Reg. Sess. (Fla. 2014) (enacted FLA. STAT. ANN. §§ 775.082(1)(b), 921.1401 (West Supp. 2015)); *Horsley v. State*, 160 So. 3d 393, 395, 405 (Fla. 2015).

HAWAII

The Hawaii Department of Corrections has confirmed that, as of May 20, 2015, there are zero persons serving a JLWOP sentence. Hawaii abolished JLWOP in 2014.³¹²

IDAHO

The Idaho Department of Corrections provided a complete list of the four persons serving JLWOP sentences that was current as of May 20, 2015. Because the Idaho Department of Corrections tracks only sentence date and not offense date, the number is approximate. It cannot account for inmates who were under eighteen at the time of their JLWOP-qualifying offense, but who were not sentenced until after reaching eighteen.

ILLINOIS

The Illinois Department of Corrections provided a complete list of all ninety-three persons serving JLWOP sentences that was current as of June 29, 2015. The number of persons serving a JLWOP sentence in Illinois will likely decrease because in 2014, the Illinois Supreme Court held that *Miller* applies retroactively on collateral review.³¹³ Moreover, a July 2015 bill eliminated mandatory JLWOP in Illinois.³¹⁴

INDIANA

The Indiana Department of Corrections has confirmed that it has zero-persons serving a JLWOP sentence current as of May 15, 2015. Because the Indiana Department of Corrections tracks only sentence date and not offense date, the number is approximate. It cannot account for inmates who were under eighteen at the time of their JLWOP-qualifying offense, but who were not sentenced until after reaching eighteen. However, other sources suggest that this number is in fact zero.³¹⁵

312. See H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014) (amending HAW. REV. STAT. ANN. §§ 706-656(1), 657 (LexisNexis Supp. 2014)).

313. See *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014).

314. See H.B. 2471, 99th Gen. Assemb., Reg. Sess. (Ill. 2015).

315. THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE, *supra* note 104, at 2.

IOWA

The Iowa Department of Corrections provided complete information on the two inmates serving JLWOP sentences that was current as of September 4, 2015.

The number the Iowa Department of Corrections reported is subject to change due to a 2013 Iowa Supreme Court ruling.³¹⁶ Shortly after *Miller*, the Governor of Iowa commuted the sentences of thirty-eight Iowan inmates serving statutorily mandated JLWOP sentences to life with the possibility of parole after sixty years.³¹⁷ In 2013, the Iowa Supreme Court ruled that these commutations were unconstitutional pursuant to *Miller* because they constituted functional JLWOP and were imposed with no individualized consideration.³¹⁸ The court, therefore, ordered resentencings in all thirty-eight cases, not all of which have occurred.³¹⁹ Thus, the number is subject to change, as Iowa retains discretionary JLWOP.

The offense date was provided not by the Iowa Department of Corrections but from a news article regarding the offense. The department provided commitment date instead of sentence date, as it does not track sentence date.

KANSAS

Kansas no longer authorizes JLWOP, having abolished it in 2011.³²⁰ The Kansas Department of Corrections has confirmed that no person is serving a JLWOP sentence in that state as of April 27, 2015.

KENTUCKY

The Kentucky Department of Corrections provided a complete list of the two persons serving JLWOP sentences that was current as of May 2, 2015. Kentucky abolished JLWOP in 1986.³²¹

LOUISIANA

The Louisiana Department of Corrections provided a complete list of all 247 persons serving JLWOP sentences that was current as of July 20, 2015.

316. See *State v. Ragland*, 836 N.W.2d 107, 109–10 (Iowa 2013).

317. *Id.* at 110–11.

318. *Id.*

319. *Id.*

320. See KANSAS STAT. ANN. § 21-6618 (2011).

321. 1986 Ky. Acts 1056.

MAINE

The Maine Department of Corrections has confirmed that no person is serving a JLWOP sentence in that state as of May 20, 2015.

MARYLAND

The Maryland Department of Corrections provided complete information regarding the nineteen persons serving JLWOP sentences that was current as of August 2015.

MASSACHUSETTS

Massachusetts retroactively abolished JLWOP in 2015,³²² and the Massachusetts Department of Corrections has confirmed that no person is serving a JLWOP sentence in that state as of May 28, 2015.

MICHIGAN

The Michigan Department of Corrections provided a complete list of all 370 persons serving JLWOP sentences that was current as of September 30, 2015. Michigan may soon have no one serving JLWOP, as the Eastern District of Michigan has held that Michigan's parole procedures, which enforce mandatory JLWOP, violate *Miller*. The state, however, has appealed.³²³

MINNESOTA

The Minnesota Department of Corrections provided a complete list of all seven persons serving JLWOP sentences that was current as of May 21, 2015. The offense dates were provided not by the Minnesota Department of Corrections but from other sources: namely, case law and news articles regarding the offenses.

The Minnesota Department of Corrections does not release information regarding individual inmates' race.

MISSISSIPPI

The Mississippi Department of Corrections provided a complete list of all sixty-eight persons serving JLWOP sentences that was current as of May 20, 2015.

322. MASS. GEN. LAWS ANN. ch. 265, § 2 (West 2015) (amended by 2014 Mass. Acts ch. 189, § 5); MASS. GEN. LAWS ANN. ch. 279, § 24 (West 2015) (amended by 2014 Mass. Acts ch. 189, § 6).

323. See *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2-3 (E.D. Mich. Jan. 30, 2013).

The number of persons serving a JLWOP sentence in Mississippi will likely decrease because in 2013, the Mississippi Supreme Court held that *Miller* applies retroactively on collateral review.³²⁴ Thus, the reported number includes persons who are eligible for resentencing, but have not yet undergone resentencing proceedings.

The offense dates were provided not by the Mississippi Department of Corrections but from other sources: namely, case law and news articles regarding the offenses.

MISSOURI

The Missouri Department of Corrections provided complete information regarding the approximately 103 persons serving JLWOP sentences as of August 14, 2015.

The number provided by the Missouri Department of Corrections is approximate. The Department's system did not have the offense date for some of the older sentences. In an effort to include all possible JLWOP offenders, it ran the search as of age twenty-one or less at the time of sentencing, assuming that most of the offenders would have been sentenced within three years of the offense date. This method could theoretically exclude an older juvenile who spent considerable time awaiting a sentence or someone whose sentence was imposed after retrial or resentencing.

The number of persons serving JLWOP in Missouri may go down, as an intermediate appellate court in Missouri has held that *Miller* applies retroactively on collateral review.³²⁵ The case, however, has been transferred to the Missouri Supreme Court for further review.³²⁶

Some Missouri offense dates were provided by outside sources: namely, case law and news articles regarding the offenses.

MONTANA

The Montana Department of Corrections provided information on the sole individual serving a JLWOP sentence that was current as of May 29, 2015. On November 20, 2015, the Montana governor granted clemency.³²⁷ Montana abolished JLWOP in 2007.³²⁸

324. See *Jones v. State*, 122 So. 3d 698, 700 (Miss. 2013).

325. See *Branch v. Cassady*, No. WD77788, 2015 WL 160718, at *10 (Mo. Jan. 13, 2015).

326. See *id.* at *1 (case transferred to Missouri Supreme Court on March 31, 2015).

327. See Laura Zuckerman, *Montana Governor Grants Clemency in 36-Year-Old Murder*, REUTERS (Nov. 20, 2015, 4:41 PM), <http://www.reuters.com/article/2015/11/20/us-montana-clemency-idUSKCN0T92W820151120#C7p0VV4rouzC2rdg.97>.

328. S.B. 547, 60th Leg., Reg. Sess. (Mont. 2007).

NEBRASKA

The Nebraska Department of Corrections provided an active inmate database that was current as of May 20, 2015. We then isolated individuals serving JLWOP sentences based on our own internal calculations, which totaled at twenty-seven.

Because the Nebraska Department of Corrections tracks only admission date and not offense or sentencing dates, the number is approximate. The Nebraska data do not include inmates sentenced to JLWOP who were under eighteen at the time of the offense, but who were not admitted to the prison system after age eighteen. They likely underreported the number of total JLWOP sentences. In particular, they likely underreported the total number of JLWOP sentences for offenses committed at age seventeen, as these are the sentences most likely to be imposed after age eighteen.

However, the total number of persons serving a JLWOP sentence in Nebraska is expected to decrease because in 2014, the Nebraska Supreme Court held that *Miller* should be given retroactive effect.³²⁹ Thus, the Nebraska total includes persons whose sentences may be reduced after a resentencing proceeding.

The offense dates were provided not by the Nebraska Department of Corrections but from other sources: namely, case law and news articles regarding the offenses.

NEVADA

The Nevada Department of Corrections provided a complete list of all six persons serving JLWOP sentences that was current as of May 20, 2015.

Because the Nevada Department of Corrections tracks only admission date and not offense or sentencing dates, the reported number is approximate. The number does not capture inmates sentenced to JLWOP who were under eighteen at the time of the offense, but who were not admitted to the prison system until after age eighteen. Accordingly, Nevada was able to provide age at admission as opposed to age at the time of the offense.

However, Nevada has recently abolished JLWOP. The change in law entitles current JLWOP prisoners to parole after having served fifteen years.³³⁰ Thus, the number of persons serving a JLWOP sentence provided by the Nevada Department of Corrections is

329. See *State v. Mantich*, 842 N.W.2d 716, 719 (Neb. 2014).

330. See A.B. 267, 78th Reg. Sess. (Nev. 2015).

misrepresentative of the actual sentences that will be served. The true number is zero. Accordingly, the Nevada Department of Corrections lists upcoming parole hearings for each of the searchable inmates on the list provided.

The offense dates were provided not by the Nevada Department of Corrections, but from other sources: namely, case law and news articles regarding the offenses.

NEW HAMPSHIRE

The New Hampshire Department of Corrections provided a complete list of the five persons serving JLWOP sentences that was current as of May 20, 2015.

In 2014, the New Hampshire Supreme Court held that four of the five juveniles' mandatory JLWOP sentences were unconstitutional under *Miller*, rendering them "entitled to the retroactive benefit of the *Miller* rule in post-conviction proceedings."³³¹

NEW JERSEY

The New Jersey Department of Corrections provided its entire offender database that was current as of August 5, 2015, which revealed no individuals serving a JLWOP sentence.

NEW MEXICO

The New Mexico Department of Corrections has confirmed that as of May 20, 2015, no person was serving a JLWOP sentence in that state.

NEW YORK

The New York Department of Corrections declined to comply with our request for information regarding its potential JLWOP inmates. Reports suggest, however, that New York has zero individuals serving such a sentence.³³² Moreover, New York's JLWOP eligibility is limited to acts of terrorism, and this does not appear to ever have been the basis for a JLWOP sentence.³³³

331. See *In re New Hampshire*, 103 A.3d 227, 235–36 (N.H. 2014).

332. See THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE, *supra* note 104, at 2.

333. See N.Y. PENAL LAW § 490.25 (McKinney 2013).

NORTH CAROLINA

The North Carolina Department of Corrections provided a complete list of the seventy-eight persons serving JLWOP sentences that was current as of July 20, 2015.

NORTH DAKOTA

The North Dakota Department of Corrections provided complete information on the one individual serving a JLWOP sentence that was current as of May 20, 2015.

OHIO

The Ohio Department of Corrections provided complete information regarding the five persons serving JLWOP sentences that was current as of July 2014.

The offense dates were provided not by the Ohio Department of Corrections but from other sources: namely, case law and news articles regarding the offenses.

OKLAHOMA

The Oklahoma Department of Corrections provided complete information on the eleven individuals serving JLWOP sentences that was current as of May 20, 2015.

Because the Oklahoma Department of Corrections tracks only sentence date and not offense date, the number is approximate. It cannot account for inmates who were under eighteen at the time of their JLWOP-qualifying offense, but who were not sentenced until after reaching eighteen.

The offense dates were provided not by the Oklahoma Department of Corrections but from other sources: namely, case law and news articles regarding the offenses.

OREGON

The Oregon Department of Corrections provided a complete list of all four persons serving JLWOP sentences that was current as of May 20, 2015.

The offense dates were provided not by the Oregon Department of Corrections but from other sources: namely, case law and news articles regarding the offenses.

PENNSYLVANIA

The Pennsylvania Department of Corrections provided a complete list of 376 persons serving JLWOP sentences that was current as of June 30, 2015. Because the Pennsylvania Department of Corrections tracks only sentence begin date (called “effective date of sentence”) and not offense date, the number is approximate.

As the original list was missing sentence date, we requested a second list on September 18, 2015. The response included 698 entries, almost twice the original number. While we could not obtain a clarification from the Pennsylvania Department of Corrections regarding how they obtained the new number, it appears that the first list included only inmates who were seventeen or younger at their effective sentencing date, while the second list included those eighteen or younger at the effective sentencing date to account for inmates for whom there was a significant time lag between offense date and effective sentence date. To acquire as accurate a number of possible, we went through the larger list to capture individuals serving JLWOP. Using news articles and/or published opinions to obtain offense dates, and then calculating age at time of offense, we were able to confirm that thirty-eight inmates from the larger list were serving JLWOP. Therefore, our current number is 414 (the original 376, plus thirty-eight). The number is still approximate because it may miss those whose offense date occurred before they reached eighteen but who were not incarcerated until they were nineteen.

We obtained offense date and age of offense for as many of the 414 as were available via published opinion or news article. Where unavailable, the effective date of sentence and age at effective date of sentence is used in place of offense date and age at offense date.

RHODE ISLAND

The Rhode Island Department of Corrections has confirmed that as of May 20, 2015, no person is serving a JLWOP sentence that was imposed before the offender reached eighteen.

As the Rhode Island Department of Corrections does not track offense date, it could not confirm that it has zero persons serving a sentence of JLWOP for an offense that occurred prior to the offender turning eighteen. However, other sources suggest that this number is in fact zero.³³⁴

334. THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE, *supra* note 104, at 2.

SOUTH CAROLINA

The South Carolina Department of Corrections provided a complete list of all thirty-seven persons serving JLWOP sentences that was current as of May 20, 2015.

The number of persons serving a JLWOP sentence in South Carolina will likely decrease because a 2015 South Carolina Supreme Court case held that *Miller* was retroactive and requires all South Carolina inmates serving JLWOP sentences to be resentenced.³³⁵

The offense dates were provided not by the South Carolina Department of Corrections but from other sources: namely, case law and news articles regarding the offenses.

SOUTH DAKOTA

The South Dakota Department of Corrections provided a complete list of the three persons serving JLWOP sentences that was current as of May 21, 2015.

TENNESSEE

The Tennessee Department of Corrections provided a complete list of the thirteen persons serving JLWOP sentences that was current as of May 20, 2015.

The number of persons serving a JLWOP sentence in Tennessee will likely decrease because in 2014, a Tennessee appellate court held that *Miller* applies retroactively on collateral review.³³⁶

The offense dates were provided not by the Tennessee Department of Corrections but from other sources: namely, case law and news articles regarding the offenses.

TEXAS

The Texas Department of Corrections provided a complete list of all seventeen persons serving JLWOP sentences that was current as of May 21, 2015. As of 2013, Texas no longer authorizes JLWOP.³³⁷

The number of persons serving a JLWOP sentence in Texas will likely decrease because in 2014, the Texas Court of Criminal Appeals held that *Miller* applies retroactively on collateral review.³³⁸

335. See *Aiken v. Byars*, 765 S.E.2d 572, 573 (S.C. 2014), *cert. denied* 135 S. Ct. 2379 (2015).

336. *Dickerson v. State*, 2014 WL 3744454, at *4 (Tenn. Crim. App. July 28, 2014).

337. See S.B. 2, 83rd Leg., 2nd Spec. Sess. (Tex. 2013); TEX. PENAL CODE ANN. § 12.31(a) (West 2011).

338. See *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. 2014).

UTAH

The Utah Department of Corrections does not track age at the time of offense. However, it identified the two persons it considered as potentially serving JLWOP sentences there. Based on independent reports, both of these persons appear to have been less than eighteen at the time they committed an offense subjecting them to a JLWOP sentence.³³⁹

VERMONT

Vermont abolished JLWOP in 2015,³⁴⁰ and the Vermont Department of Corrections has confirmed that no person is serving a JLWOP sentence in that state as of May 28, 2015.

VIRGINIA

The Virginia Department of Corrections declined to comply with our request for information regarding JLWOP inmates. Our count of twenty-two persons subject to JLWOP there is based on a media report from 2014.³⁴¹

WASHINGTON

The Washington Department of Corrections provided a complete list of the twenty-two persons serving JLWOP sentences that was current as of June 30, 2015.

The number of persons serving a JLWOP sentence in Washington will likely decrease because Washington's 2013 post-*Miller* statutory amendments entitle all persons currently subject to JLWOP to resentencing.³⁴² Since passage of the law, at least five inmates have received sentences of less than JLWOP.

339. See *State v. Houston*, 353 P.3d 55 (2015), *petition for cert. filed*, No. 15-7087 (U.S. Nov. 20, 2015); *Utah Father Charged with Hiding Evidence in Arizona Murder Case*, KINGMAN DAILY MINER, Aug. 11, 2002, at A12 (Morris Mullins).

340. H.B. 62, 2015 Leg., Reg. Sess. (Vt. 2015) (enacting VT. STAT. ANN. 13, § 7045 (2015)).

341. See Louis Hanson, *Lawmakers, Activists Seek Reduced Sentence for Teen*, VIRGINIAN-PILOT (Dec. 3, 2013), http://pilotonline.com/news/local/crime/lawmakers-activists-seek-reduced-sentence-for-teen/article_61b02784-3856-5bb5-bbd8-27a5294b1c36.html.

342. See S.B. 5064, 63d Leg., 2013 Reg. Sess. (Wash. 2013) (amending WASH. REV. CODE § 10.95.030(3)(a)(i) (West. Supp. 2015)) (entitling everyone serving mandatory JLWOP to a resentencing).

WEST VIRGINIA

The West Virginia Department of Corrections has confirmed that no person is serving a JLWOP sentence in that state as of May 28, 2015. In 2014, West Virginia abolished JLWOP.³⁴³

WISCONSIN

The Wisconsin Department of Corrections provided a complete list of the eight persons serving JLWOP sentences that was current as of July 2012.

Because Wisconsin courts have treated *Miller* as applying retroactively, the number in actuality is likely to be smaller.³⁴⁴

WYOMING

The Wyoming Department of Corrections provided a complete list of the four persons serving JLWOP sentences that was current as of May 20, 2015. Wyoming abolished JLWOP in 2013. The total number of persons serving JLWOP sentences may actually be zero, as the abolition applies retroactively unless the person has assaulted a law enforcement officer while in custody or has attempted to escape custody.³⁴⁵

343. See H.B. 4210, 81st Leg., 2d Sess. (W. Va. 2014) (enacting W. VA. CODE ANN. §§ 61-2-2, -14a, 62-3-15, -22, -23, 62-12-13(b)).

344. See *State v. Sanders*, 855 N.W.2d 720, *3 (Wis. Ct. App. 2014); *State v. Hampton*, 842 N.W.2d 536 (Wis. Ct. App. 2013).

345. See WYO. STAT. ANN. §§ 6-2-101(b), -10-301(c) (2015).

APPENDIX B

State	Number of Inmates Currently Serving JLWOP Sentences	Number of JLWOP Sentences by Race/Ethnicity (if disclosed)					Gender (if disclosed)	
		Black	Hispanic	White	Asian	American Indian	Male	Female
Alabama	19	15	0	4	0	0	18	1
Alaska	0	0	0	0	0	0	0	0
Arizona	33	6	13	14	0	0	33	0
Arkansas	57	40	0	17	0	0	56	1
California ³⁴⁶	288	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Colorado ³⁴⁷	56	18	13	18	2	1	51	1
Connecticut	4	4	0	0	0	0	4	0
Delaware	5	4	0	1	0	0	5	0
Florida ³⁴⁸	227	135	12	78	0	0	213	12
Georgia	25	19	2	4	0	0	25	0
Hawaii	0	0	0	0	0	0	0	0
Idaho	4	0	0	4	0	0	3	1
Illinois ³⁴⁹	93	65	11	15	0	0	90	1
Indiana	0	0	0	0	0	0	0	0
Iowa	2	1	0	1	0	0	2	0
Kansas	0	0	0	0	0	0	0	0
Kentucky	2	1	0	0	1	0	2	0
Louisiana ³⁵⁰	247	199	0	47	0	1	243	4
Maine	0	0	0	0	0	0	0	0
Maryland ³⁵¹	19	14	0	3	0	0	14	0
Massachusetts	0	0	0	0	0	0	0	0
Michigan ³⁵²	370	260	8	98	2	0	357	11
Minnesota	7	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mississippi	68	47	0	21	0	0	67	1
Missouri	103	57	1	43	1	1	99	4
Montana	1	0	0	1	0	0	1	0

346. One person convicted as a juvenile without the possibility of parole has subsequently had his or her sentence reduced.

347. Colorado did not disclose the race or gender of four of its inmates.

348. Florida did not disclose the race or gender of two of its inmates. Similarly, six inmates' records indicate that he or she is "out of department custody by court order."

349. Illinois did not disclose the race or gender of two of its inmates.

350. These numbers reflect the total number of persons serving JLWOP sentences. In some cases, however, an inmate received multiple JLWOP sentences for different offenses. Including these sentences, the total number of JLWOP sentences imposed in Louisiana is 271.

351. Maryland did not provide the race of two of its inmates.

352. Michigan did not provide the race or gender of two of its inmates.

Nebraska	27	12	1	13	0	1	25	2
Nevada ³⁵³	6	3	1	1	0	1	6	0
New Hampshire	5	1	1	3	0	0	5	0
New Jersey	0	0	0	0	0	0	0	0
New Mexico	0	0	0	0	0	0	0	0
New York ³⁵⁴	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
North Carolina	78	59	6	9	4	0	77	1
North Dakota	1	0	1	0	0	0	1	0
Ohio	5	2	0	3	0	0	5	0
Oklahoma ³⁵⁵	11	5	0	5	0	1	11	0
Oregon ³⁵⁶	4	0	0	3	0	0	3	0
Pennsylvania	414	281	46	85	2	0	406	8
Rhode Island	0	0	0	0	0	0	0	0
South Carolina ³⁵⁷	37	24	0	9	2	0	35	1
South Dakota	3	0	0	2	0	1	3	0
Tennessee	13	7	0	6	0	0	12	1
Texas	17	13	4	0	0	0	16	1
Utah	2	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Vermont	0	0	0	0	0	0	0	0
Virginia ³⁵⁸	22	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Washington	22	1	0	16	3	2	22	0
West Virginia	0	0	0	0	0	0	0	0
Wisconsin	8	4	0	3	0	1	8	0
Wyoming ³⁵⁹	4	0	0	3	0	0	3	0
Total ³⁶⁰	2295	1303	120	531	17	10	1933	52

353. Recent change in law entitles current JLWOP prisoners to parole after having served fifteen years. *See* A.B. 267, 78th Reg. Sess. (Nev. 2015). Thus, the number of persons serving a JLWOP sentence provided by the Nevada Department of Corrections is misrepresentative of the actual sentences that will be served. The true number is zero. Accordingly, the Nevada Department of Corrections lists upcoming parole hearings for the searchable inmates on this list.

354. As noted *supra* notes 332–33, the New York Department of Corrections declined to comply with our request for information regarding its potential JLWOP inmates. Reports suggest, however, that New York has zero individuals serving such a sentence. Moreover, New York's JLWOP eligibility is limited to acts of terrorism, which does not appear to ever have been the basis for a JLWOP sentence.

355. Oklahoma had one additional African American, male inmate who committed suicide while serving his sentence. *Prison Inmate Commits Suicide*, NEWSON6 (Oct. 9, 2007, 12:50 PM), <http://www.newson6.com/story/7732056/prison-inmate-commits-suicide>.

356. Oregon did not provide race and gender data for one inmate.

357. South Carolina had one inmate's race listed as "other" and did not provide race or gender information for another inmate.

358. Virginia's Department of Corrections did not comply with the authors' FOIA requests. The figure listed in Appendix B is based on a 2014 news report. *See* Hanson, *supra* note 341.

359. One person convicted in Wyoming has been incarcerated out-of-state. Wyoming did not provide race or gender information on this inmate.

360. We were not able to obtain race data for 311 inmates; similarly, we were not

APPENDIX C

County/Parish, State	Number of JLWOP Sentences	Number of JLWOP Sentences by Race/Ethnicity (if disclosed)					Gender (if disclosed)	
		Black	Hispanic	White	Asian	American Indian	Male	Female
Allegheny, PA	37	33	0	4	0	0	37	0
Cook, IL ³⁶¹	65	47	9	7	0	0	62	1
East Baton Rouge, LA	35	34	0	1	0	0	35	0
Harris, TX	11	9	2	0	0	0	10	1
Jefferson, LA	33	27	0	6	0	0	33	0
Los Angeles, CA	112	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Miami-Dade, FL ³⁶²	30	20	0	9	0	0	30	0
Oakland, MI ³⁶³	50	31	2	15	1	0	47	2
Orleans, LA	72	71	0	1	0	0	71	1
Philadelphia, PA	236	189	34	13	0	0	233	3
Sacramento, CA	23	N/A	N/A	N/A	N/A	N/A	N/A	N/A
St. Louis City, MO	41	22	1	16	1	1	39	2
Wayne, MI	156	146	0	10	0	0	153	3

able to obtain gender data for 308 inmates.

361. Cook County, Illinois did not provide gender or race data for two of its inmates.

362. The Miami-Dade, Florida Department of Corrections did not provide race and gender information for one inmate.

363. The Oakland, Michigan Department of Corrections did not provide race and gender information for one inmate.
